# DOCKET

No. 87-1703-CFX Title: F. Dale Robertson, Chief of the Forest Service, et al., Petitioners
Status: GRANTED v.
Methow Valley Citizens Council, et al.

Docketed:
April 14, 1988 Court: United States Court of Appeals for the Ninth Circuit

Vide:
87-1704 Counsel for petitioner: Solicitor General

Counsel for respondent: Amster,Glenn J., Bricklin,David A.

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Feb 17 1988 | | Application for extension of time to file petition and order granting same until March 30, 1988 (O'Connor, February 18, 1988). |
| 2 | Mar 18 1988 | | Application for further extension of time to file petition and order granting same until April 14, 1988 (O'Connor, March 23, 1988). |
| 3 | Apr 14 1988 | G | Petition for writ of certiorari filed. |
| 4 | May 6 1988 | | Brief of respondent Methow Recreation, Inc. in opposition filed. |
| 6 | May 8 1988 | | Order extending time to file response to petition until June 1, 1988. |
| 7 | Jun 1 1988 | | Brief of respondents Methow Valley Citizens Council, et al. in opposition filed. |
| 8 | Jun 7 1988 | | DISTRIBUTED. June 23, 1988 |
| 9 | Jun 14 1988 | X | Reply brief of petitioner F. Dale Robertson, Chief filed. |
| 10 | Jun 27 1988 | | Petition GRANTED. The case is consolidated with 87-1704, and a total of one hour is allotted for oral argument. |
| | | | ********** |
| 11 | Aug 3 1988 | G | Motion of the Solicitor General to dispense with printing the joint appendix filed. |
| 13 | Aug 3 1988 | | Order extending time to file brief of petitioner on the merits until September 10, 1988. |
| 14 | Aug 10 1988 | G | Motion of Pacific Legal Foundation for leave to file a brief as amicus curiae filed. |
| 15 | Sep 9 1988 | | Brief amicus curiae of Institute of Law and Public Helath Protection filed. VIDED. |
| 18 | Sep 9 1988 | | Brief of respondent Methow Recreation, Inc. filed. |
| 20 | Sep 9 1988 | | Order extending time to file brief of petitioner on the merits until September 13, 1988. |
| 17 | Sep 13 1988 | | Brief of petitioner F. Dale Robertson, Chief filed. |
| 16 | Sep 14 1988 | | Box of Lodgings received. |
| 22 | Sep 19 1988 | | Order extending time to file brief of respondent on the merits until November 14, 1988. |
| 25 | Oct 1 1988 | D | Motion of respondents Oregon Natural Resources Council, et al. for divided argument filed. |
| 23 | Oct 3 1988 | | Motion of the Solicitor General to dispense with printing the joint appendix GRANTED. |
| 24 | Oct 3 1988 | | Motion of Pacific Legal Foundation for leave to file a brief as amicus curiae GRANTED. |
| 26 | Oct 11 1988 | | Motion of respondents Oregon Natural Resources Council, et al. for divided argument DENIED. |

No. 87-1703-CFX

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 27 | Oct 24 1988 | | SET FOR ARGUMENT. Monday, January 9, 1989. This case is consolidated with 87-1704. (1st case) (1 hr.) |
| 28 | Nov 10 1988 | | Extension of time to file typewritten brief of respondents Methow Valley Citizens Council, et al. (No. 87-1703) extended to November 17, 1988. Printed copies to be filed and served November 21, 1988. Extension is limited to respondents in No. 87-1703 and is not extended to any amicus curiae parties. |
| 29 | Nov 14 1988 | | Lodging received. |
| 31 | Nov 14 1988 | | Brief amicus curiae of International Association of Fish and Wildlife Agencies filed. VIDED. |
| 32 | Nov 14 1988 | | Brief amici curiae of California, et al. filed. VIDED. |
| 33 | Nov 14 1988 | | Brief amicus curiae of Center for Environmental Education filed. VIDED. |
| 34 | Nov 14 1988 | | Brief amici curiae of National Wildlife Federation, et al. filed. |
| 35 | Nov 17 1988 | | Brief amicus curiae of American Planning Association filed. |
| 36 | Nov 18 1988 | | Brief of respondents Methow Valley Citizens Counsel, et al. filed. |
| 37 | Nov 22 1988 | | CIRCULATED. |
| 38 | Dec 5 1988 | | Lodging received. |
| 39 | Dec 16 1988 | X | Reply brief of petitioner F. Dale Robertson, Chief filed. |
| 40 | Jan 9 1989 | | ARGUED. |

# PETITION FOR WRIT OF CERTIORARI

(1)

87-1703

No.

Supreme Court, U.S.
FILED
APR 14 1988
JOSEPH F. SPANIOL, JR.

# In the Supreme Court of the United States

OCTOBER TERM, 1987

F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE, ET AL., PETITIONERS

*v.*

METHOW VALLEY CITIZENS COUNCIL, ET AL.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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## QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act requires federal agencies to include in each environmental impact statement: (a) a fully developed plan to mitigate environmental harm; and (b) a "worst case" analysis of potential environmental harm if relevant information concerning significant environmental effects is unavailable or too costly to obtain.

2. Whether the Forest Service may issue a special use permit for recreational use of national forest land in the absence of a fully developed plan to mitigate environmental harm.

## PARTIES TO THE PROCEEDING

The petitioners are: F. Dale Robertson, Chief of the Forest Service; James Torrence, Regional Forester; William D. McLaughlin, Supervisor, Okanogan National Forest; and the Forest Service.

The respondents are: Methow Valley Citizens Council; Washington Environmental Council; Sierra Club; and Methow Recreation, Inc.

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# In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE, ET AL., PETITIONERS

*v.*

METHOW VALLEY CITIZENS COUNCIL, ET AL.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of F. Dale Robertson, Chief of the Forest Service, et al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 833 F.2d 810. The opinion of the district court (App., *infra*, 20a-47a) is unreported.

### JURISDICTION

The court of appeals entered its judgment (App., *infra*, 72a) on December 1, 1987. On February 18, 1988, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 30, 1988. On March 23, 1988, Justice O'Connor further extended the time for filing the petition to and including April 14, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. 4332, provides, in relevant part:

> The Congress authorizes and directs that, to the fullest extent possible: • • • (2) all agencies of the Federal Government shall—
>
> • • • • •
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Pertinent excerpts from the regulations involved in this case are reproduced in an appendix to this petition (App., *infra*, 73a-76a).

## STATEMENT

Petitioners seek review of a court of appeals decision reversing a magistrate's determination that the Forest Service had fully complied with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*,



and its own regulations in deciding to issue a special use permit for the proposed Early Winters Ski Resort in the Okanogan National Forest.

1. Congress has created a National Forest System and entrusted its management to the Department of Agriculture's Forest Service. See National Forest Management Act of 1976, § 2, 16 U.S.C. 1600. Congress has specifically directed the Forest Service to administer the national forests "for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." Multiple-Use Sustained-Yield Act of 1960, § 1, 16 U.S.C. 528. As part of this multiple-use program, the Forest Service has permitted development of 170 alpine ski areas within these federally reserved lands. See H.R. Rep. 99-709, 99th Cong., 2d Sess. Pt. 1, at 2 (1986). The ski areas, which occupy less than 1/20th of 1% of the national forest lands, account for more than 6% of recreational visitor use (*ibid.*).

In 1968, Congress established the North Cascades National Park and directed the Secretary of the Interior and the Secretary of Agriculture to designate portions of that enclave and adjacent national forests for public uses, including camping and ski areas. Act of Oct. 2, 1968, §§ 101, 504, 16 U.S.C. 90, 90d-3. Pursuant to this specific congressional directive, the Forest Service prepared a report entitled the *North Cascades Winter Sports Study* [hereinafter *North Cascades Study*] to compare existing and potential ski areas in the North Cascades and to recommend further development alternatives. The *North Cascades Study*, which was completed in 1970, concluded that existing ski areas should be expanded and identified a single site as suitable for development of a "major destina-

tion ski resort."[1] That site is a 6,000-foot mountain in the Okanogan National Forest known as Sandy Butte.

In 1978, Methow Recreation, Inc. (MRI), applied to the Forest Service for a "special use" permit, pursuant to 36 C.F.R. 251.50, to develop an alpine ski resort at Sandy Butte, to be known as Early Winters. In response, the Forest Service prepared an environmental impact statement, known as the *Early Winters Study*, in accordance with Section 102 of NEPA, 42 U.S.C. 4332, to assess the environmental consequences of the proposed development.[2] The *Early Winters Study* was the first in a series of

[1] A major destination ski resort is a large, multi-season ski area with sufficient ski runs, adequate vertical rise, sufficiently varied activities and appropriate high-quality base facilities to entice vacationers to travel long distances and to stay several days at the site.

[2] This final environmental impact statement – formally entitled the *Early Winters Alpine Winter Sports Study* and sometimes referred to as an "FEIS" – was released on August 31, 1984 (49 Fed. Reg. 34575). The Forest Service completed and circulated a draft environmental impact statement in 1982, but delayed release of the statement and a decision on MRI's permit application while Congress considered including Sandy Butte in a proposed wilderness designation. On July 3, 1984, Congress passed the Washington State Wilderness Act of 1984, Pub. L. No. 98-339, 98 Stat. 299 ., designating as wilderness certain portions of the National Forest System in Washington – not including Sandy Butte – and directing (§ 2(b), 98 Stat. 299) that "other National Forest System lands in the State of Washington be available for non-wilderness multiple uses." The Senate Report accompanying the Act spoke directly to the issue of further development at Sandy Butte (S. Rep. 98-461, 98th Cong., 2d Sess. 11 (1984)):

> That area of the Okanogan National Forest known as Sandy Butte has been excluded from wilderness designation in S. 837. * * * The designation by Congress in S. 837 of appropriate wilderness areas in Washington State makes it unnecessary to further withhold the Sandy Butte/Early Winters Alpine Winter Sports Study FEIS pending completion of the Okanogan Forest Plan. The Forest Service and the Department of Agriculture are



steps that had to be completed before issuance of a special use permit. *Early Winters Study* xvi.[3]

2. The *Early Winters Study* explained that its purpose was to provide the Forest Service with "the information required to evaluate the potential for skiing at Early Winters, to assist in making a decision whether to issue a special use permit for downhill skiing on all or part" of Sandy Butte. *Early Winters Study* 1. The Study considered five alternative levels of development in detail, including a "no action" alternative, and identified the second highest

> directed to allow the evaluation process for the Sandy Butte development to proceed without additional delay * * *.

For the Court's convenience, we have lodged a copy of the *Early Winters Study* with the Clerk of the Court.

[3] The Forest Service generally reviews special use permit applications for major developments through a two-stage process. In the first stage, the Forest Service examines the general environmental and financial feasibility of the proposed development. The environmental study is usually conducted through the preparation of an environmental impact statement in accordance with NEPA's requirements (§ 102(2)(C), 42 U.S.C. 4332(2)(C)), while financial feasibility is determined through a conventional assessment of the developer's resources. Once the Forest Service determines that a general scheme for development is environmentally sound and financially feasible, the Forest Service may issue a special use permit to plan, construct, maintain, and operate the development. However, prior to any construction activity, the Forest Service must approve the developer's master plan for development, construction, and operation of the project. In the second stage, the Forest Service reviews the developer's proposed master plan. Based on this plan, the Forest Service also completes an additional environmental analysis of on-site impacts. Only after completion of the second environmental analysis and final approval of the completed master plan may the developer begin construction. All construction and operation of the facility must be in accordance with the master plan and the permit's other requirements.

level—serving up to 8,200 skiers at one time—as the preferred development option (*id.* at 6-22).[4]

The *Early Winters Study* made clear that a decision to go forward with a ski resort would not result directly in development; rather, "[f]urther environmental analysis and review will be required prior to any decision by the Forest Service to allow a specific development at Early Winters, and by the responsible state and local government agencies, prior to any authorization to develop non-Forest Service lands." *Early Winters Study* 1. Following issuance of a special use permit, the developer would have to submit a detailed mountain and base development plan for the Forest Service's approval, providing the precise ski area design (*id.* at xvi). At this stage, the *Study* explained, site-specific mitigation plans would be required (*ibid.*).

Although it was too early to design a detailed mitigation plan, it was not too early to identify significant anticipated effects that major development might have on Sandy Butte and the surrounding communities. The *Early Winters Study* evaluated the potential effects on air and water quality, vegetation, wildlife, fisheries, timber resources, socio-economic conditions, land use, recreation, transportation, and public services. *Early Winters Study* 65-145. In each of these areas, the *Study* considered

[4] The alternatives ranged from maintaining the status quo (no ski hill development) to developing a ski area capable of serving 10,500 skiers at one time. The *Early Winters Study* did not give detailed consideration to expansion of existing ski areas at other locations or development of new ski areas at other locations. The *North Cascades Study* had considered these options and had concluded that—of 23 existing and potential sites—Sandy Butte was the only site in the State of Washington suitable for development as a major ski area. See *Early Winters Study* 6-7; see also App., *infra*, 51a-52a.



both the impacts within and outside the National Forest, denominating on-site impacts as primary and off-site impacts as secondary (*ibid.*).[5]

The *Study* concluded that all of the alternatives, including the "no action" option, would adversely affect Methow Valley's mule deer population and the region's air quality. In the case of the mule deer, the *Study* observed that the ski resort itself could reduce their range and fawning habitat but that, even if the ski resort were not built, the anticipated growth in human population on surrounding non-federal land would disturb the mule deer herds. *Early Winters Study* 75-76. In the case of air quality, the *Study* concluded that the construction and operation of the ski resort would not have a measurable impact, but the secondary impacts from development of nearby private land would have a significant effect that would increase with successive levels of development (*id.* at 65-67). In both cases, the *Study* identified measures to reduce or eliminate the adverse effects (*id.* at 14-18, 68-69, 77-78). The *Study* specifically cautioned, however, that these suggestions were conceptual, that they would be made more specific in subsequent steps of the planning process, and that additional mitigation measures might be required (*id.* at 14).[6]

[5] The *Study* acknowledged that the evaluation of off-site impacts was hampered by the absence of any specific development plans. "Since there are no pending proposals or plans to develop off-site lands, the evaluation of off-site impacts is not site-specific. It is general in nature, acknowledging to the extent practicable the impacts associated with the growth that is likely to be induced by development of Sandy Butte for skiing. The evaluation of off-site impacts [is] included to provide a more complete picture of the likely effects of ski development at Early Winters and alert other jurisdictions to decisions to [be] made." *Early Winters Study* 1-3.

[6] The *Study* suggested that on-site wildlife effects could be mitigated by locating runs, lifts, and roads in a minimally disruptive manner and by restricting travel and other activities in sensitive areas

3. The Regional Forester reviewed the *Early Winters Study* and concurred in the *Study*'s recommendation supporting a ski resort capable of serving 8,200 skiers at one time. He accordingly issued a decision, on July 5, 1984, to seek a qualified developer (App., *infra*, 63a-71a).[7] The Regional Forester explained that the highest development alternative (serving up to 10,500 skiers at one time) "would provide maximum utilization of the recreation resource opportunities and increased economic benefit to the area" (*id.* at 65a), and that the "no action" alternative "would cause the least disruption to the natural environment" (*ibid.*), but the selected alternative "provides a balance of concerns for the physical and biological components of the human environment in addition to concerns for social and economic welfare" (*ibid.*). He further observed that adverse environmental effects would result from all of the alternatives, including the "no action" option, that these adverse effects would result almost exclusively from off-site development, and that "[p]ractical measures to reduce

during fawning season (*Early Winters Study* 14-16). The *Study* repeated that "[s]pecific mitigation for wildlife at the ski development can only be determined in review of the Master Plan" (*id.* at 16). The *Study* suggested that local governments could mitigate off-site wildlife effects through restrictive zoning and other conventional land use management techniques (*id.* at 77-78). The *Study* further suggested that the adverse air quality effects, resulting from off-site use of motor vehicles, wood stoves, and fireplaces, could be mitigated through local government initiatives, including the creation of an airshed management plan (*id.* at 68-69).

[7] This decision was an important but preliminary step in the permitting process. See note 3, *supra*. It established that development of a certain size and character was environmentally feasible and preferable to other alternatives, but it did not determine whether MRI (which initially proposed the development) or some other applicant would qualify for or obtain the special use permit.



the adverse impacts have been, or are in the process of being, implemented by Okanogan County" (*id.* at 67a).[8]

On October 1, 1984, the Methow Valley Citizens Council et al. (MVCC) requested, pursuant to 36 C.F.R. 211.18, that the Chief of the Forest Service reverse the Regional Forester's decision. He denied that request, with an extensive discussion of the reasons supporting his decision, on December 16, 1985 (App., *infra*, 49a-62a). MVCC then filed this action in the United States District Court for the District of Oregon. The complaint contended, among other claims, that the *Early Winters Study* did not conform with NEPA's requirements, that the Forest Service's decision to develop Sandy Butte was not in the public interest, and that the Forest Service had violated the National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.*, and the Clean Air Act, 42 U.S.C. 7401 *et seq.* The parties agreed to submit the issues to a United States magistrate pursuant to 28 U.S.C. 636(c).

The magistrate dismissed through summary judgment MVCC's claims under the National Forest Management Act and the Clean Air Act, and, after a hearing to supplement the administrative record, he rejected all of MVCC's remaining claims (App., *infra*, 20a-48a). The magistrate

[8] These efforts included the development of various local restrictions to protect wildlife and air quality. See App., *infra*, 66a-70a. In a Memorandum of Agreement with the Forest Service, the Environmental Protection Agency, and the State Department of Ecology, Okanogan County committed itself to develop and enforce an air quality ordinance and other mitigation measures necessary to maintain air quality within the standards of the state air quality implementation plan. The Forest Service, in turn, agreed to ensure that measures sufficient to maintain air quality were in place before allowing any construction of permitted facilities at Sandy Butte. See Supp. E.R. 47-48.

concluded that the Forest Service's decision to go forward with the issuance of a special use permit was unreviewable under Ninth Circuit precedent (*id.* at 28a-30a); that even if it were reviewable, it was not arbitrary and capricious (*id.* at 30a n.4); and that it did not violate due process (*id.* at 31a). The magistrate next held that the *Early Winters Study* satisfied NEPA's requirements for an environmental impact statement (*id.* at 31a-47a). He rejected MVCC's argument that the *Study*'s discussion of alternative development sites was inadequate (*id.* at 34a-38a), observing that "the North Cascades Winter Sports Study, a work cited in the [*Early Winters Study*] and available to the public, had identified Sandy Butte as the only area in the Okanogan Forest having good potential as a major ski development" (*id.* at 37a), and that expansions of sites "a hundred or more miles away from the Okanogan National Forest are not reasonable alternatives" (*ibid.*). The magistrate further determined that the Forest Service adequately discussed the project's environmental impacts (*id.* at 38a-47a). He specifically rejected MVCC's contentions that the Forest Service was obligated to prepare a "worst case" analysis of the possible impacts (*id.* at 40a, 45a) and that the *Early Winters Study* gave insufficient analysis to possible mitigation measures (*id.* at 41a-42a, 45a-46a).

4. MVCC appealed the magistrate's decision directly to the court of appeals (see 28 U.S.C. 636(c)(3)). The court reversed the magistrate's determination, holding that the *Early Winters Study* failed to satisfy NEPA's requirements and that the Forest Service's decision to issue a special use permit was arbitrary and capricious (App., *infra*, 1a-19a).

The court found the *Early Winters Study* to be flawed in three respects. First, the court held that the *Study* should have given detailed consideration to the possibility of expanding existing ski resorts as one of the alternative development proposals, rejecting the magistrate's determination that these were not feasible alternatives (App., *infra*, 8a-11a). Second, the court held that the statement did not provide a sufficiently detailed discussion of the environmental impacts of the proposed project on mule deer and air quality (*id.* at 11a-16a). The court specifically stated that if the government is unable to obtain adequate information on the effects of the project on mule deer, the government must conduct a "worst case" analysis of the environmental impacts (*id.* at 13a, 14a).[9] Finally, the court held that Section 102 of NEPA (42 U.S.C. 4332) "requires that 'action be taken to mitigate the adverse effects of major federal actions' " (App., *infra*, 17a).[10] The court specifically ruled that an environmental impact statement must contain both a detailed plan to mitigate any adverse environmental effects and an analysis of the plan's effectiveness (*ibid.*).[11] Having failed to include such a detailed plan, the *Early Winters Study* was "inadequate as a matter of law" (*id.* at 19a).

With respect to the Forest Service's decision to issue a special use permit, the court acknowledged (App., *infra*, 3a-4a) that its prior precedent had indicated that such decisions are not reviewable under the Administrative Pro-

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[9] The court based this requirement on its recent decision in *Oregon Natural Resources Council* v. *Marsh*, 820 F.2d 1051, 1058-1059 (1987).

[10] The court quoted *Stop H-3 Ass'n* v. *Brinegar*, 389 F. Supp. 1102, 1111 (D. Haw. 1974), rev'd on other grounds, 533 F.2d 434 (9th Cir.), cert. denied, 429 U.S. 999 (1976).

[11] The court stated: " 'The importance of the mitigation plan cannot be overestimated. It is a determinative factor in evaluating the adequacy of an environmental impact statement. Without a complete mitigation plan, the decisionmaker is unable to make an informed judgment as to the environmental impact of the project—one of the main purposes of an environmental impact statement.' " App., *infra*, 19a (quoting *Oregon Natural Resources Council*, 820 F.2d at 1055).

cedure Act, 5 U.S.C. (& Supp. IV) 701-706. The court concluded, however, that subsequent Forest Service regulations had since created " 'law' for this court to apply" and that the decisions were therefore now reviewable (App., *infra,* 4a-5a). The court then held that the relevant Forest Service regulations (36 C.F.R. 251.54(e)(4) and 36 C.F.R. 251.56(a)(1)(ii)) require "an adequate mitigation plan" (App., *infra,* 5a n.3), and that the mitigation plan contained in the *Early Winters Study* was so inadequate that the "decision to grant the special use permit could be none other than arbitrary, capricious, and an abuse of discretion" (*ibid.*).

## REASONS FOR GRANTING THE PETITION

The court of appeals has departed from the teachings of *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), and has imposed significant new NEPA obligations on federal agencies. The court's decision, which builds upon its prior decision in *Oregon Natural Resources Council* v. *Marsh*, 820 F.2d 1051 (1987),[12] requires all environmental impact statements to contain detailed and demonstrably effective mitigation plans and to include a "worst case" analysis whenever the agency lacks information or adequate scientific methodology to determine precisely a potential environmental effect. Neither NEPA nor its implementing regulations authorize these court-created directives. The court of appeals' decision also incorrectly construes the Forest Service's special use permit regulations to impose similar mitigation obligations. The court's rigid new requirements would actually impede the goal of informed

[12] The Solicitor General has sought review of the *Oregon Natural Resources Council* decision through a petition for a writ of certiorari filed simultaneously with this petition.



agency decision-making by preventing federal agencies from carrying out their resource management responsibilities through systematic project development. The court's clear deviation from established precedent has great practical significance owing to the vast expanse of federal lands and the numerous planned and potential federal projects located within the Ninth Circuit.

1. Section 102(2)(C) of NEPA directs that federal agencies proposing actions that significantly affect the quality of the human environment must prepare a detailed statement on "the environmental impact of the proposed action." 42 U.S.C. 4332(2)(C). This requirement serves two purposes: First, it obligates the agency to consider the environmental consequences of the proposed action; and second, it assures the public that the agency has considered environmental concerns in the decisionmaking process. *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983).

As this Court has explained, "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural." *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 558. Furthermore, "the only procedural requirements imposed by NEPA are those stated in the plain language of the Act" (*id.* at 548). "The procedural duty imposed upon agencies by [Section 102(2)(C)] is quite precise, and the role of the courts in enforcing that duty is similarly precise." *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 (1976). "The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken' " (*id.* at 410 n.21 (citation omitted)). Furthermore, the courts should defer to the judgment of the Council on Environmental Quality

(CEQ)—the agency responsible for assuring proper implementation of NEPA (42 U.S.C. 4344)—which has promulgated regulations for preparing environmental impact statements. "CEQ's interpretation of NEPA is entitled to substantial deference." *Andrus* v. *Sierra Club,* 442 U.S. 347, 358 (1979).

The court of appeals ignored these established principles and, relying solely on its own precedent, created two significant new NEPA requirements. The court incorrectly held that an agency must include in every environmental impact statement (a) a fully developed plan to mitigate environmental harm; and (b) a "worst case" analysis of potential environmental harm if relevant information concerning significant environmental effects is unavailable or too costly to obtain.[13]

a. The court of appeals based its mitigation requirement on the fundamentally mistaken premise that Section 102 of NEPA "requires that 'action be taken to mitigate the adverse effects of major federal actions' " (App., *infra,* 17a (citation omitted)). Neither Section 102, nor this Court's decisions interpreting that provision, impose any such requirement. The court obtained its proposition from a 1974 district court decision, *Stop H-3 Ass'n* v. *Brinegar,* 389 F. Supp. 1102 (D. Haw.), that was reversed

[13] We believe that the court of appeals also erred in holding that the *Early Winters Study*'s discussion of development alternatives was inadequate, but we do not press that question in this Court. The court appears to have agreed that the reasonableness of the alternatives depends essentially upon the scope of the proposed action as defined by the agency (App., *infra,* 9a). But the court proceeded to ignore the agency's own description of the scope of its action. Nevertheless, the question of appropriate alternatives is somewhat factbound and less significant than the mitigation and worst case issues. Furthermore, the government may be able to cure that supposed deficiency on remand without an excessive commitment of time and resources.



on other grounds, 533 F.2d 434 (9th Cir.), cert. denied, 429 U.S. 999 (1976).[14] The district court decision was dubious authority even when its ink was fresh; this Court's subsequent decisions in *Vermont Yankee* and *Kleppe* demonstrate that the decision was quite clearly wrong. This Court has repeatedly emphasized that Section 102 requires the agency to consider and inform the public of potential environmental impacts; it does not require the agency to "elevate environmental concerns over other appropriate considerations." *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen,* 444 U.S. 223, 227 (1980).

The court of appeals' imposition of a substantive duty to mitigate environmental harm is also inconsistent with the CEQ regulations implementing NEPA. Those regulations require an agency to identify mitigation possibilities in the environmental impact statement in the course of discussing project alternatives and the resulting environmental effects. See 40 C.F.R. 1502.14(f), 1502.16(h). In addition, an agency must state, as part of its ultimate decision, whether it has adopted mitigation measures (40 C.F.R. 1505.2) and, if it has, it must implement those measures (40 C.F.R. 1505.3). These regulations ensure that decisionmakers consider opportunities to mitigate environmental harm, but they do not impose a duty to adopt such measures. The decision whether to adopt mitigation measures, like the decision whether to go forward with the project itself, is left to the expert agency's informed discretion. Compare *Strycker's Bay Neighborhood Council, Inc.,* 444 U.S. at 227; *Vermont Yankee Nuclear Power Corp.,* 435 U.S. at 558; *Kleppe,* 427 U.S. at 410 n.20.

[14] The district court decision in *Stop H-3* states, without any citation of authority, that "NEPA *implies* a requirement that action be taken to mitigate the adverse effects of major federal actions." 389 F. Supp. at 1111 (emphasis added).

The court of appeals not only imposed a new substantive duty to mitigate environmental harm, it also imposed a concomitant procedural obligation—derived solely from its own precedents—to develop a " 'complete mitigation plan' " (App., *infra*, 19a (quoting *Oregon Natural Resources Council*, 820 F.2d at 1055)).[15] As in the case of the substantive duty to mitigate harm, this procedural requirement to develop a detailed mitigation plan finds no source in Section 102 of NEPA. The CEQ's implementing regulations recognize that potential mitigation measures should be identified—as was done here (see pages 6-7, *supra*)—but they do not require development of a complete mitigation plan. The court's blanket statements that the " 'importance of a mitigation plan cannot be overestimated' " (App., *infra*, 19a (quoting *Oregon Natural Resources Council*, 820 F.2d at 1055)) and that " '[i]t is a determinative factor in evaluating the adequacy of an environmental impact statement' " (*ibid.*) find no support whatsoever in NEPA or the CEQ regulations.

The court of appeals' decision on this score would have severe consequences. As the facts of this case demonstrate, the decision would prevent an agency from evaluating the environmental consequences of a proposed project through the familiar and sensible concept of staged project development.[16] In particular, it would prevent an agency

[15] The court first suggested that agencies must provide a detailed discussion of mitigation measures in *Northwest Indian Cemetery Protective Ass'n* v. *Peterson*, 795 F.2d 688, 697 (9th Cir. 1985), cert. granted on other grounds, No. 86-1013 (May 4, 1987). That case cited *Adler* v. *Lewis*, 675 F.2d 1085, 1096 (9th Cir. 1982), which made no mention of mitigation at all. The court later expanded the obligation to prepare a detailed mitigation plan in *Oregon Natural Resources Council*, 820 F.2d at 1055.

[16] See, *e.g.*, D. Dannenbring & M. Starr, *Management Science: An Introduction* 548 (1981) ("A project is itself a combination of many varied and complex tasks or activities. These tasks are interdependent in that most cannot begin until some other task has been completed.").



from making any initial feasibility determinations until the entire project planning process has been completed and a complete mitigation plan has been developed. This approach pervasively conflicts with the CEQ's regulations mandating early application of NEPA (40 C.F.R. 1501.2, 1502.5(b)), encouraging tiered environmental analysis (40 C.F.R. 1502.20), and forbidding agencies from committing resources in a manner that will bias the agency's ultimate decision (40 C.F.R. 1502.2(f)). As a practical matter, the court's approach would frustrate or impede a wide range of federal and federally permitted projects. Here, for example, the Forest Service could offer potential developers no assurance whatsoever that it will issue a special use permit for the Early Winters project until a developer has spent several years and millions of dollars to provide comprehensive plans on which to base a detailed mitigation plan. More generally, agencies would be forced to defer complete environmental analysis until far along in the planning process and to invest resources on a large scale before making even preliminary decisions. By deferring the environmental analysis to satisfy the requirements of this decision, the agencies would run the grave risk of having proposed projects enjoined on the ground that irretrievable commitments have been made without the requisite environmental analysis.

"As *Vermont Yankee* made clear, NEPA does not require agencies to adopt any particular internal decisionmaking structure." *Baltimore Gas & Elec. Co.*, 462 U.S. at 100. NEPA and its implementing regulations were deliberately structured to permit federal decisionmakers great latitude to determine the appropriate scope of their environmental discussion and evaluation. See, *e.g.*, *Strycker's Bay Neighborhood Council*, 444 U.S. at

227.[17] The court's decision here would eliminate this latitude by forcing agencies to fit all of their actions into the court's rigid and counterproductive formula for environmental decisionmaking. The court's formula is particularly unsuitable for federal agencies such as the Forest Service, which must manage vast acreages of federal lands through long-range planning techniques[18] and must therefore engage in staged decisionmaking.

b. The court of appeals also erred in concluding (App., *infra*, 13a) that a "worst case" analysis is required whenever an agency is unable to obtain information on which to base a reasoned decision. The court noted (*id.* at 13a n.11) that CEQ regulations had at one time required that environmental impact statements evaluate uncertainty by including a "worst case analysis and an indication of the probability or improbability of its occurrence" (40 C.F.R. 1502.22 (1985)), but that CEQ had subsequently rescinded that requirement.[19] The court determined that the "worst case" requirement nevertheless remains in effect because "the regulation was merely a codification of prior NEPA caselaw" (App., *infra*, 13a n.11), citing its previous decision in *Southern Oregon Citizens Against Toxic*

[17] See also *Friends of the Earth* v. *Hintz*, 800 F.2d 822, 837-838 (9th Cir. 1986); *River Road Alliance, Inc.* v. *Corps of Engineers*, 764 F.2d 445, 448 (7th Cir. 1985), cert. denied, 475 U.S. 1055 (1986); *Friends of Endangered Species, Inc.* v. *Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985); *Roosevelt Campobello Int'l Park Comm'n* v. *EPA*, 684 F.2d 1041, 1047 (1st Cir. 1982).

[18] See generally Wilkinson & Anderson, *Land and Resource Planning in the National Forests*, 64 Or. L. Rev. 1 (1985).

[19] We have reproduced the relevant portions of CEQ's present regulation and the rescinded "worst case" regulation in the appendix, *infra*, 73a-75a.



*Sprays, Inc.* v. *Clark* (*SOCATS*), 720 F.2d 1475, 1478 (9th Cir. 1983), cert. denied, 469 U.S. 1028 (1984).

The *SOCATS* decision mistakenly derived that proposition from *Sierra Club* v. *Sigler*, 695 F.2d 957 (5th Cir. 1983). The question in *Sigler* was whether the Army Corps of Engineers was required to comply with the CEQ regulation under the particular facts of that case. The Fifth Circuit first admitted that while there is "some language in NEPA which may be said to endorse generally the concept of a worst case analysis" the statute's "literal language does not require a worst case analysis" (*id.* at 969). The court next noted that a series of judicial decisions had recognized that NEPA does contemplate that agencies would engage in " '[r]easonable forecasting and speculation' " concerning future environmental effects, including the "probabilities of the occurrence" and the " 'cost of uncertainty—i.e. the costs of proceeding without more and better information' " (*id.* at 970).[20] The court then stated that the "CEQ's worst case analysis merely codifies these judicially created principles" (*id.* at 971). Thus, the Fifth Circuit effectively concluded that the worst case regulation was the CEQ's mechanism for implementing certain judicially recognized NEPA objectives. The court did not hold that the worst case methodology was the *only* allowable mechanism for effecting those general goals.

The CEQ has adhered to the objectives identified in *Sigler*, but has determined that "the 'worst case analysis' requirement is an unproductive and ineffective method of achieving those goals" (51 Fed. Reg. 15618, 15620

[20] The court specifically cited *Scientists' Institute for Public Information, Inc.* v. *AEC*, 481 F.2d 1079, 1092 (D.C. Cir. 1973); *Carolina Envtl. Study Group* v. *United States*, 510 F.2d 796, 799 (D.C. Cir. 1975); and *Alaska* v. *Andrus*, 580 F.2d 465, 473-474 (D.C. Cir. 1978), vacated on other grounds *sub nom*, *Western Oil & Gas Ass'n* v. *Alaska*, 439 U.S. 922 (1978).

(1986)).[21] The CEQ has therefore adopted "a wiser and more manageable approach to the evaluation of reasonably foreseeable significant adverse impacts in the face of incomplete or unavailable information" (*id.* at 15620).[22] The court of appeals' decisions in this case and in *Oregon Natural Resources Council* effectively overrule the CEQ's new regulation and install worst case analysis as a permanent feature of NEPA compliance.

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[21] The CEQ had received frequent complaints that the worst case approach was not an effective method for addressing uncertainty and led to excessive paperwork and delays. 51 Fed. Reg. 15619-15620 (1986). "Experts in the field of risk analysis and perception stated that the 'worst case analysis' lacks defensible rationale or procedures, and that the current regulatory language stands 'without any discernible link to the disciplines that have devoted so much thought and effort toward developing rational ways to cope with problems of uncertainty.' " 50 Fed. Reg. 32234, 32236 (1985). The CEQ itself found that the methodology "can breed endless hypothesis and speculation" (51 Fed. Reg. 15620 (1986)) and "has proved counterproductive, because it has led to agencies being required to devote substantial time and resources to preparation of analyses which are not considered useful to decisionmakers and divert the EIS process from its intended purpose" (50 Fed. Reg. 32236 (1986)). We described some of these difficulties in a previous petition for a writ of certiorari in *SOCATS*. See *Clark* v. *Southern Oregon Citizens Against Toxic Sprays, Inc.*, cert. denied, 469 U.S. 1028 (1984) (White and O'Connor, JJ., dissenting). The CEQ's effort to alleviate these difficulties, after the denial of certiorari in *SOCATS*, by revision of its regulations has now been repudiated by the court of appeals.

[22] The CEQ's revised regulation provides that when relevant information cannot be obtained because the costs of obtaining it are exorbitant or the means to obtain it are not known, the environmental impact statement must identify the unavailable information and its relevance, must summarize existing scientific information bearing on foreseeable environmental impacts, and must contain the agency's evaluation of those impacts based on research methods generally accepted in the scientific community. 40 C.F.R. 1502.22.



This aspect of the court of appeals' decision is obviously contrary to this Court's recognition in *Andrus* v. *Sierra Club*, that the CEQ's judgment is entitled to "substantial deference" even when the agency has changed its regulations governing NEPA compliance (442 U.S. at 358). See also, *e.g.*, *American Trucking Ass'ns* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967). As in the case of its new mitigation requirements, the court of appeals holding here would have severe consequences. As the CEQ has explained, federal agencies would be forced to conduct wasteful and time-consuming inquiries into speculative impacts that lack "a firm connection between credible science and the hypothetical consequences of an agency's proposed action." 50 Fed. Reg. 32236 (1985). This sort of "pure conjecture * * * lacking a credible scientific basis is *not* useful to either the decisionmaker or the public" (*ibid.* (emphasis in original)).

2. The court of appeals not only misconstrued NEPA, it also misconstrued the Forest Service's regulations governing the issuance of a special use permit. The principal regulation involved in this case requires special use authorizations to contain terms and conditions that will "minimize damage to scenic and esthetic values and fish and wildlife habitat and othewise [*sic*] protect the environment." 36 C.F.R. 251.56(a)(1)(ii).[23] The court interpreted this provision to require "an adequate mitigation plan" (App., *infra*, 5a n.3). The court then reasoned (*ibid.*):

> Since the mitigation "plan" here at issue is so vague and undeveloped as to be wholly inadequate, [citing the court's discussion of NEPA mitigation requirements], the Regional Forester's decision to grant

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[23] We have reproduced the relevant portions of the Forest Service regulations in the appendix, *infra* 75a-76a.

> the special use permit could be none other than arbitrary, capricious and an abuse of discretion.

Thus, the court concluded that the Forest Service regulation incorporates the court's judicially created NEPA mitigation requirements.

The court's reasoning here is seriously flawed. The Forest Service regulation makes no mention of mitigation plans and was never intended to incorporate the sort of "complete mitigation plan" that the court itself created—without statutory authority—in *Oregon Natural Resources Council* v. *Marsh, supra.* The Forest Service operated under guidelines, even prior to NEPA, that directed the agency to minimize harm to resources.[24] In 1980, it revised its regulations to reflect their present form (45 Fed. Reg. 38324 (1980)). However, the Forest Service has never suggested, at any point in that process, that its regulations require a complete mitigation plan, at the permit stage, of the kind the court of appeals imposed here. Instead, the Forest Service has routinely imposed terms and conditions similar to those ultimately imposed in this case.[25]

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[24] See *1963 Forest Service Manual* § 2140.1 (in planning special uses, the agency's objective is to manage and protect resources and to minimize adverse effects to projects); § 2134 (special use permits must contain stipulations that ensure maintenance of productivity of land and resolution of conflicts with other planned or prospective uses).

[25] A special use permit was issued to MRI on July 21, 1986, shortly after this case was argued before the court of appeals. The special use permit conditioned all construction on the Forest Service's prior approval of a fully developed master plan, which was to contain detailed mitigation measures. The initial permit also put the developer on notice that it would be required to protect scenic and esthetic values, prevent soil erosion and degradation of water, soil, and air quality, and immediately to cease construction upon discovery of archaeologically or historically significant material. See U.S. Dep't of Agriculture Forest Service Special Use Authorization, Region 06, User No. 4171 (Methow Recreation Inc.) paras. 41, 44, 48, 49, 50, 54, 62, 76.



The court of appeals' holding here "runs roughshod over the established proposition that an agency's construction of its own regulations is entitled to substantial deference." *Lyng* v. *Payne,* 476 U.S. 926, 939 (1986). *See, e.g., United States* v. *Larionoff,* 431 U.S. 864, 872 (1977) ("In construing administrative regulations, 'the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' ", quoting *Bowles* v. *Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945)). The Forest Service's interpretation of its regulation here is plainly reasonable and should be respected. The court's decision, which requires *every* special use permit henceforth issued to contain a detailed plan to mitigate on- and off-site effects, creates yet another unjustified obstacle to development and use of federal lands.

3. The court of appeals' decisions in this case and in *Oregon Natural Resorces Council* v. *Marsh, supra,* would greatly expand the federal agencies' substantive and procedural duties under NEPA. None of the newly imposed duties finds its source in NEPA or in its implementing regulations; rather, they are purely judicial creations. Furthermore, the court's two decisions have confirmed those duties as a settled element of the Ninth Circuit's peculiar NEPA jurisprudence. The court's clear deviation from this Court's NEPA precedents has great practical significance. As we have already explained, the court's newly fashioned NEPA obligations would impose substantial burdens on the federal government, private developers and, ultimately, the taxpaying public, without corresponding benefits.

Indeed, these court-imposed requirements are not only contrary to sound environmental decisionmaking, they are contrary to the goals of NEPA and the procedures created by the CEQ for achieving those goals. The resulting costs would be enormous even if limited to the projects within the Ninth Circuit owing to the vast expanse of federal lands and the numerous planned and potential federal projects subject to that court's rulings. This Court's review is therefore warranted.

## CONCLUSION

The petition for a writ of certiorari should be granted.[26]

Respectfully submitted.

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APRIL 1988

[26] The Court may wish to consolidate this case with *Marsh* v. *Oregon Natural Resources Council*, No. 87-____, or to order that the cases be heard in tandem. The government's petition for a writ of certiorari in that case (which is being filed simultaneously with this petition) presents overlapping, but not identical, NEPA issues.

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86-4108
D.C. No. 85-2124-DA

METHOW VALLEY CITIZENS COUNCIL, ET AL.,
PLAINTIFFS-APPELLANTS

*v.*

REGIONAL FORESTER, ETC., ET AL., DEFENDANTS-APPELLEES

## APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

WILLIAM M. DALE, JR., Magistrate, Presiding

Argued and Submitted
July 6, 1987—Portland, Oregon

Filed December 1, 1987

## OPINION

Before: ALFRED GOODWIN and WARREN J. FERGUSON, Circuit Judges, and ALBERT LEE STEPHENS, JR.,* District Judge.

Opinion by Judge FERGUSON

* Honorable Albert Lee Stephens, Jr., Senior United States District Judge, Central District of California, sitting by designation.

FERGUSON, Circuit Judge:

Sandy Butte overlooks the Methow Valley, an unspoiled, sparsely populated area on the eastern side of the North Cascade Mountains in the State of Washington. The Methow Valley provides critical winter range and migration corridors for Washington's largest migratory deer herd. Sandy Butte is a 3,900-acre parcel in the Okanogan National Forest. The upper one-third of Sandy Butte is entirely roadless. In 1978 appellee Methow Recreation, Inc. (MRI) applied for a "special use" permit to develop and operate a four-season destination ski resort on Sandy Butte and a large parcel of private land it had acquired adjacent to Sandy Butte. The proposed development is known as the Early Winters project. The project is expected to spawn extensive commercial and residential development in the Methow Valley.

Pursuant to requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, mandating completion of an Environmental Impact Statement (EIS) analyzing the environmental impacts of "major" governmental actions, the appellee Forest Service studied the question of whether it should allocate Sandy Butte for use as a downhill ski area. In 1982 the Forest Service published a draft EIS on a proposal to designate Sandy Butte for use as a major ski area capable of serving 8,200 skiers at one time (SAOT). The final EIS was issued in 1984. Based on its contents, in July 1984 the Regional Forester issued a "Record of Decision" which adopted a "future management plan" for Sandy Butte. The plan allocated the area for use as a ski area capable of serving 8,200 SAOT. The record of decision also approved the issuance of a special use permit to MRI for the Early Winters Project.[1]

[1] A special use permit is necessary whenever a private party seeks to use lands owned by the federal government. The Forest Service issues special use permits under authority derived from 16 U.S.C. § 497.



In December 1985, appellants Methow Valley Citizens Council, et al. (MVCC), brought this action in the District Court for the District of Oregon alleging violations of the National Forest Management Act, 16 U.S.C. §§ 1600-1614, the Clean Air Act, 42 U.S.C. §§ 7401-7626, and NEPA. Pursuant to local rule, the case was assigned to a United States Magistrate. The National Forest Management Act and Clean Air Act claims were dismissed upon motions for summary judgment and are not raised on appeal. The remaining NEPA issues were tried before the district court and the court affirmed the Forest Service's Record of Decision, dismissing the remaining claims. MVCC subsequently filed this appeal.

The issues facing this court are whether the district court erred in holding that the Regional Forester's decision to issue a special use permit is not reviewable and in its determination that the EIS adequately discussed alternatives to the proposed project, impacts to the deer herd, impacts on air quality, other significant impacts, and mitigation measures. Jurisdiction of this court is found under 28 U.S.C. § 1291.

I.

The Administrative Procedure Act, 5 U.S.C. §§ 701-706, governs judicial review of agency actions. Section 702 grants standing to challenge an agency action to anyone adversely affected by such action, except where the statute under which the action was taken precludes judicial review, or where the action is committed to agency discretion by law. 5 U.S.C. § 701(a). While there is no claim here that judicial review is barred by statutory preclusion, there is dispute as to whether the Regional Forester's issuance of a special use permit is an action

committed to agency discretion such that it is removed entirely from the scrutiny of judicial review. The district court held that it was committed to agency discretion and not subject to judicial review.

The district court cited two cases—*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) and *Ness Investment Corp. v. United States Dept. of Agric., Forest Service*, 512 F.2d 706 (9th Cir. 1975)—in support of its decision. In *Citizen to Preserve Overton Park*, the Supreme Court emphasized that action committed to agency discretion by law is "a very narrow exception . . . applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " 401 U.S. at 410 (citation omitted). In *Ness*, this court held that the denial of a special use permit was not judicially reviewable because there was no "law to apply" by which the court could assess the legality of the agency's decision. The court held that neither the authorizing statute, 16 U.S.C. § 497, nor the very general language of corresponding regulations, 36 C.F.R. § 251.1 et seq., offered standards by which the agency's action could be tested. *Id.* at 715, 716. *Contra Sabin v. Butz*, 515 F.2d 1061, 1065 (10th Cir. 1975). Thus central to our decision in *Ness* was the lack of formal guidelines for the issuance of special use permits.

The district court failed to note, however, that in 1980—prior to the commencement of activities relevant to this action—the Forest Service issued detailed supplemental regulations which, while not entirely removing the decision to issue a special use permit from agency discretion, do impose specific obligations on the authority considering issuance. See 36 C.F.R. §§ 251.54-251.56. These guidelines, binding upon the Regional Forester when deciding whether to grant MRI its special use permit for development of the Sandy Butte area, constitute sufficient



"law" for this court to apply to confer jurisdiction over the matter. *See Wallace v. Christensen*, 802 F.2d 1539, 1556 (9th Cir. 1986) (en banc) (Hall, J., concurring).[2] Thus we hold that the Regional Forester's decision to issue a special use permit is subject to judicial review[3] where review involves an inquiry into whether the proper factors were considered by the Forestry Service. *See Save the Bay, Inc. v. Administrator of E.P.A.*, 556 F.2d 1282, 1295-96 (5th Cir. 1977).[4]

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[2] In *Wallace v. Christensen*, Judge Hall correctly noted that

> [t]he inquiry into whether there are regulations which a court may look to in reviewing an agency decision is a component of the section 701(a)(2) determination of whether a matter is committed to agency discretion by law . . . If there are no statutory or regulatory directives then a court may conclude that the agency action at issue falls into that narrow class of cases in which there is no law to apply.

802 F.2d at 1556 (Hall, J., concurring) (citations omitted).

[3] The magistrate stated that if he did have jurisdiction to review the Regional Forester's decision to issue the special use permit, then he believed that the decision was not arbitrary or capricious. However, an application for a special use permit must include "measures and plans for the protection and rehabilitation of the environment during construction, operation, maintenance, and termination of the project . . .", 36 C.F.R. § 251.54(e)(4), and each special use authorization "shall contain . . . [t]erms and conditions which will . . . minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise [sic] protect the environment". 36 C.F.R. § 251.56(a)(1)(ii). Thus the Code of Federal Regulations specifically requires the existence of, among other things, an adequate mitigation plan. Since the mitigation "plan" here at issue is so vague and undeveloped as to be wholly inadequate, *see infra*, the Regional Forester's decision to grant the special use permit could be none other than arbitrary, capricious and an abuse of discretion.

[4] *Save the Bay* involved a challenge to the issuance of a permit pursuant to authority granted under the National Pollution Discharge Elimination System, 33 U.S.C. § 1342. The Fifth Circuit considered

II.

The National Environmental Policy Act, codified at 42 U.S.C. § 4332, provides in relevant part that when an EIS must be prepared – whenever a major government action is proposed – it must include

> a detailed statement by the responsible official on –
>
> (i) the environmental impact of the proposed action.
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented.
>
> (iii) alternatiyes to the proposed action.
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C). Section 4332(2)(E) adds that all agencies of the Federal Government shall, to the fullest extent possible

> study, develop, and describe appropriate alternatives to recommended course of action in any proposal which involves unresolved conflicts concerning alternative use of available resources;

42 U.S.C. § 4332(2)(E).

There are two purposes served by preparation of an EIS. The statement should "provide decision-makers with

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whether it had jurisdiction in light of the statute's broad language explaining that "[o]nce the relevant factors are before the agency, it can weigh them within [its] broad mandate with an expertise to which the restraining powers of judicial review could add little." 556 F.2d at 1295. Nevertheless, the court held that "[j]udicial review, however, can quite easily be effective to assure that all those factors receive the agency's attention." *Id.* at 1296.



an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in light of its environmental consequences," *Trout Unlimited v. Morton*, 509 F.2d 1276, 1282 (9th Cir. 1974), as well as "provide the public with information and an opportunity to participate in gathering information." *Citizens for A Better Henderson v. Hodel*, 768 F.2d 1051, 1056 (9th Cir. 1985) (citations omitted).

An EIS aids the agency's own decisionmaking process by ensuring that the agency has before it " 'all possible approaches to a particular project . . . which would alter the environmental impact and the cost-benefit balance.' " *State of Alaska v. Andrus*, 580 F.2d 465, 474 (D.C. Cir.), *vacated in part sub nom. Western Oil & Gas v. Alaska*, 439 U.S. 922 (1978) (quoting *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971)).

A.

The findings of fact underlying a lower court's decision on the adequacy of an EIS are reviewed for clear error. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 696 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 1971 (1987). "Interpretations of [environmental] regulations present questions of law, which are reviewable de novo." *Oregon Environmental Council v. Kunzman*, 817 F.2d 484, 493 (9th Cir. 1987) (citing *Sierra Club v. Union Oil Co. of California*, 813 F.2d 1480, 1489 (9th Cir. 1987)). "We review de novo the district court's determination of whether the EIS is reasonably thorough in discussing the significant aspects of the probable environmental impact of the proposed agency action." *Oregon Natural Resources Council v. Marsh*, 820 F.2d 1051, 1054 (9th Cir. 1987) (citation omitted). This requires application of a

"rule of reason" because a "reviewing court may not 'fly speck' an EIS and hold it insufficient on the basis of inconsequential, technical deficiencies." *Kunzman*, 817 F.2d at 492. In other words, "whether a particular deficiency, or combination of deficiencies in an EIS is sufficient to warrant holding it legally inadequate, or constitutes merely a 'fly speck,' is essentially a legal question, reviewable de novo." *Id.* at 493.

III.

To explain the obligations set forth in section 4332, provisions in the Code of Federal Regulations address, inter alia, the discussion of alternatives[5] and the discussion of the foreseeable environmental consequences of these various alternatives[6] which must be included in an EIS. "The detail that NEPA requires in an EIS depends upon the nature and scope of the proposed action." *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982).

A.

To be adequate, an environmental impact statement must consider every reasonable alternative. *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 988 (9th Cir. 1985); *California v. Block*, 690 F.2d at 766-67; *Adler v. Lewis*, 675 F.2d 1085, 1097 (9th Cir. 1982) ("this court has held the alternatives discussion to be subject to 'reasonableness.' "); *Save Lake Washington v. Frank*, 641 F.2d 1330, 1334 (9th Cir. 1981); *Lange v. Brinegar*, 625 F.2d 812, 818 (9th Cir. 1980) ("The discussion of alternatives in an E.I.S. statement is subject to a construction of reasonableness."). An EIS is rendered inadequate by

[5] 40 C.F.R. § 1502.14.

[6] 40 C.F.R. § 1502.16.



the existence of a viable but unexamined alternative. *Citizens for a Better Henderson*, 768 F.2d at 1057 (citations omitted). Furthermore, even if an alternative requires "legislative action", this fact "does not automatically justify excluding it from an EIS." *City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986) (footnote omitted), *cert. denied*, 108 S. Ct. 197 (1987). Thus, the range of alternatives considered must be sufficient to permit a reasoned choice. *Life of the Land v. Brinegar*, 485 F.2d 460, 472 (9th Cir. 1973), *cert. denied*, 416 U.S. 961 (1974).

Here the Forest Service's purpose—to provide a "winter sports opportunity"—is broadly framed in terms of service to the public benefit. It is not, *by its own terms*, tied to a specific parcel of land. *Compare City of Angoon*, 803 F.2d at 1021; *Trout Unlimited*, 509 F.2d at 1286. There appears no tenable reason for the Forest Service to be wedded exclusively to the development of Sandy Butte. Thus it should have appeared obvious that investigation was warranted to determine whether the development of winter sports opportunities could be pursued at alternative sites.[7]

Appellants have offered evidence suggesting that other sites may be well suited for the type of recreational development envisioned by the Forest Service. Unlike Sandy Butte, the sites discussed by the appellants are not adjacent to land owned by defendant MRI, but under the

[7] The Forest Service's final EIS listed four alternatives, including their preferred course of action, in addition to the alternative of "no-action" mandated by statute. Yet all four of the "action" alternatives required development of Sandy Butte. No consideration was given in the EIS to ways of achieving the Forest Service's goal through other options, such as the expansion of existing downhill ski areas in other parts of Washington State.

directive given to the Forest Service in its manual,[8] that fact does not preclude consideration of other reasonable alternatives. Moreover, since we find it reasonable to assume that expansion of existing ski areas would have less environmental impact than would the construction of an entirely new ski area,[9] while possibly achieving a comparable net increase in the total capacity of skiers served,[10] such alternatives might have been appropriate for investigation.

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[8] The manual provides in relevant part that

> A permit shall not be granted simply to provide a commercial profit-making opportunity. The Forest Service is not required to accommodate a desire of an individual applicant, a real public service or other justification must be evident . . . to show at least that the use meets a public need and will not conflict with National Forest objectives, programs or purposes.

Forest Service Manual § 2710.3.

[9] In *Coalition for Canyon Preservation v. Bowers,* 632 F.2d 774, 778 (9th Cir. 1980), the defendants intended to construct a new four-lane highway which pass through parkland in plaintiffs' town. The EIS was held to be deficient because it failed to consider the alternative of improving and widening a two-lane highway already in existence. This court stated that "the alternative . . . was both reasonable and obvious, and that therefore the EIS is deficient . . . . The use of a narrower than four-lane road is made even more obvious by the possibility that parkland would thereby [be] spared." *Id.* at 784 (citations omitted). *See California v. Block,* 690 F.2d 753, 767 (9th Cir. 1982) ("In the absence of an alternative that looks to already developed areas for future resource extraction and use, the . . . decisional process ends its inquiry at the beginning.").

[10] For example, one of the existing ski areas in Washington State has plans in motion to expand into a destination ski resort. A 1981 development report prepared for the Mission Ridge ski area details an intended expansion of the facility to accomodate an additional 3,900 SAOT, to make its total capacity 6,500 SAOT.



This court, however, would not require that the Forest Service explore an unreasonably broad range of alternatives. Rather, the range "need not extend beyond those [alternatives] reasonably related to the purposes of the project." *Trout Unlimited,* 509 F.2d at 1286 (citations omitted). Thus, the Forest Service should more clearly articulate its goal, specifically identifying the market and geographic pool of skiers targeted. This will provide a clear standard by which it can determine which alternatives are appropriate for investigation and consideration in its EIS. In its present state, the EIS's discussion of alternatives to the proposed action is inadequate as a matter of law.

**B.**

The district court held that the EIS adequately discussed the environmental impacts of the Early Winters project and its alternatives. We do not agree.

**1.**

The Magistrate's error resulted, in part, because he assumed that the law distinguished between primary and secondary impacts. Such a distinction would only confuse the issue. Rather, it is well established that NEPA and the Council on Environmental Quality guidelines require discussion of *all* significant impacts proximately caused by the proposed action—whether they, by convenience, are termed "primary" or "secondary". *See Coalition for Canyon Preservation v. Bowers,* 632 F.2d 774, 783 (9th Cir. 1980) ("so-called 'secondary' impacts are often as significant as 'primary' effects."); *Trout Unlimited,* 509 F.2d at 1238 n.9 ("The central focus should not be on a primary/secondary impact analysis but upon those impacts (either primary or secondary) which have a 'significant impact'

upon the environment."); *see also Environmental Defense Fund, Inc. v. Hoffman*, 566 F.2d 1060, 1067 (8th Cir. 1977).

This court would not require the government to speculate on impacts in order to "foresee the unforeseeable". *See City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975). However,

> [i]t must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as "crystal ball inquiry".

*Id.* at 676 (quoting *Scientists' Institute for Public Information v. A.E.C.*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)). Thus we find it imperative that the Forest Service evaluate the reasonably foreseeable significant effects which would be proximately caused by implementation of the proposed action. *Port of Astoria, Oregon v. Hodel*, 595 F.2d 467, 478 (9th Cir. 1979) (EIS must address those reasonably likely consequences of a proposed development that would have an environmental impact).

2.

Plaintiffs argue that the development in the Methow Valley that is reasonably certain to follow development of Sandy Butte will cut off the deer herd's migration route, usurp fawning and staging areas and eliminate winter range—all of which are vital to the herd's survival. In contrast, the Forest Service believes that "with the implementation of mitigation measures" the impacts to the mule



deer will be minor. This court fails to see the logic with which the Forest Service reaches this conclusion, since not only has the effectiveness of these mitigation measures not yet been assessed, but the mitigation measures themselves have yet to be developed.

Additionally, the Forest Service's own witness testified at trial as to the insufficiency of the data underlying the Service's conclusions in the EIS. He stated that the data was inadequate in terms of assessing the impacts of, for example, residential development reasonably certain to follow development of ski slopes on Sandy Butte.

The Forest Service is presently preparing a detailed and comprehensive study of the mule deer. However, just as the subsequent preparation of mitigation measures will not cure a deficient EIS, *see infra*, neither will a subsequent study providing information essential to assessment of the environmental impacts of a proposed action and its alternatives.

If a government agency has difficulty obtaining adequate information upon which to make a reasoned assessment of the environmental impacts of a course of action, it may not simply negate the existence of these impacts. Rather, it has an obligation to engage in what is called a "worst-case" analysis.[11] This is because "NEPA requires a 'worst case analysis' when 'the information relevant to adverse impacts is essential . . . and is not known and the overall costs of obtaining it are exorbitant or . . . the in-

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[11] The worst case analysis requirement was codified in 1979, 40 C.F.R. § 1502.22, and rescinded in 1986. This rescission, however, does not nullify the requirement, *Marsh*, 820 F.2d at 1058 n.8, since the regulation was merely a codification of prior NEPA caselaw. *See Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1475, 1478 (9th Cir. 1983), *cert. denied*, 469 U.S. 1028 (1984); *see also Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1244 (9th Cir. 1984).

formation . . . is important and the means to obtain it are not known. . . ." *Friends of Endangered Species*, 760 F.2d at 988 (quoting *Save our Ecosystems v. Clark*, 747 F.2d 1240, 1243 (9th Cir. 1984)).

> The purpose of the analysis is to carry out NEPA's mandate for full disclosure to the public of the potential consequences of agency decisions, and to cause agencies to consider those potential consequences when acting on the basis of scientific uncertainties or gaps in available information. The analysis is formulated on the basis of available information, using reasonable projections of the worst possible consequences of a proposed action.

*Save our Ecosystems*, 747 F.2d at 1244-45 (quoting 46 Fed. Reg. 18032 (1981)); *see Oregon Natural Resources Council*, 820 F2d at 1059.

An absence of critical information renders it impossible for the Forest Service to make a reasoned decision in the disposition of a special use permit application. The EIS's cursory discussion of the impacts to the mule deer herd, based on incomplete information, is inadequate as a matter of law. If the Forest Service finds that the new comprehensive study of the mule deer still provides incomplete information, a worst-case analysis would be required for the areas in which information is lacking.[12]

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[12] A district court has held that "[w]ithout accurate evidence of the effectiveness of . . . mitigation techniques, the Forest Service must prepare a worst case analysis." *Nat'l. Wildlife Federation v. United States Forest Service*, 592 F. Supp. 931, 943 (D. Oreg. 1984). This court expresses no opinion as to whether a worst case analysis is necessarily required in the absence of an evaluation of the effectiveness of mitigation measures. However, we do recognize the inherent limitation on a decisionmaker's ability to make a reasoned decision as to the environmental impacts of a proposed action where information contained in an EIS is incomplete or inaccurate.



3.

Appellants also contend that the district court erred in its assessment of the adequacy of the EIS's discussion of impacts on air quality.

a.

The Pasayten Wilderness has been designated a "Class I" area by Congress. This means that its air is so unpolluted as to require heightened protection. Appellants believe that pollution in the Methow Valley proximately caused by the proposed development of Sandy Butte will significantly deteriorate the air quality in the Pasayten Wilderness and that this was not revealed in the EIS. Appellees contend, and the district court held, that the EIS's discussion of air quality impacts to the Pasayten Wilderness is adequate. We disagree.

The EIS concluded that no Class I area would be impacted by the proposed action. In reaching this conclusion the government relied on data that was based upon an estimate of the difference in elevation between the floor of the Methow Valley and the lowest portion of the ridge separating the Methow Valley from the Pasayten Wilderness—an estimate that has since been shown to be egregiously incorrect. This error casts significant doubt on the assumption that the ridge forms a physical barrier that would prevent air pollution trapped beneath the inversion layer in Methow Valley from entering the wilderness area. Incorrect assumptions usually lead to incorrect conclusions. Thus the district court's conclusion, that the information relied upon by the government in preparation of the relevant section of the EIS was adequate, is clearly erroneous. The Forest Service must reassess the impacts upon the Pasayten Wilderness.

b.

Appellees acknowledge that without effective mitigation measures, the state standards for Total Suspended Particulates will be exceeded in nearly all of the areas of the upper Methow Valley as a result of foreseeable growth and development stimulated by the Early Winters project. This, presumably, is why the Regional Forester in his Record of Decision approving the special use permit application required that an air quality management program be developed. However, we interpret NEPA and section 497 as requiring this type of inquiry and analysis *before* a permit application can be approved.[13]

[13] Appellants have made two additional arguments relating to air quality which merit attention. First, they argue that the development of Sandy Butte and the growth it will spur will likely expend the degradation increment available for this area under the federal Prevention of Significant Deterioration program. They suggest that the government is required to include in its EIS an assessment of how this exhaustion of the increment will limit opportunities for future commercial development in the Methow Valley. We disagree. "[A]ssuming compliance [with federally established maximum threshold levels of pollution], growth management decisions were left by Congress for resolution by the states." *Alabama Power Co. v. Costle,* 636 F.2d 323, 364 (D.C. Cir. 1979).

Second, appellants argue that the EIS is inadequate as a matter of law because it did not discuss the foreseeable significant carbon monoxide emissions from wood stoves. While the precise amount of air quality degradation that would result from these emissions is not entirely clear, given that even the highest estimate places the impact at still far below the applicable national standard, this omission is probably not sufficient to render the EIS inadequate. However, since a new EIS must be prepared, inclusion of an analysis of carbon monoxide emissions produced by wood stoves would assist the decisionmaker in making a fully informed decision.



c.

Section 4332 of NEPA requires that "action be taken to mitigate the adverse effects of major federal actions." *Stop H-3 Ass'n v. Brinegar,* 389 F. Supp. 1102, 1111 (D. Hawaii 1974), *rev'd on other grounds,* 533 F.2d 434 (9th Cir.), *cert. denied,* 429 U.S. 999 (1976). Thus an agency cannot decide to "act now and deal with the environmental consequences later." *North American Wild Sheep v. United States Dept. of Agric.,* 681 F.2d 1172, 1181 (9th Cir. 1982). Consequently, an EIS must include a thorough discussion of measures to mitigate the adverse environmental impacts of a proposed action. *Oregon Natural Resources Council v. Marsh,* 820 F.2d 1051, 1055 (9th Cir. 1987). "A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA." *Northwest Indian,* 795 F.2d at 697. "Moreover, the EIS must analyze the mitigation measures in detail and explain the effectiveness of the measures." 820 F.2d at 1055; *see Northwest Indian,* 795 F.2d at 697. And we note that the subsequent preparation of an elaborate mitigation plan "would not absolve a failure to prepare an adequate EIS." *Trout Unlimited,* 509 F.2d at 1284.

Provisions of the Code of Federal Regulations governing the award of special use permits impose an affirmative duty on the appellees to develop the necessary mitigation measures *before* the permit is granted.[14] Similarly, the EIS

[14] The relevant section provides that

> Each special use authorization shall contain: (1) Terms and conditions which will . . . (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and othewise [sic] protect the environment; . . . and (2) such terms and conditions as the authorized officer deems necessary to . . . (vi) require siting to cause least damage to the environment, taking into consideration feasibility and other relevant factors . . .

36 C.F.R. § 251.56(a).

must also contain a detailed explanation of the specific measures which will be employed to mitigate the adverse impacts of a proposed action. 40 C.F.R. §§ 1502.14(f), 1502.16(h).

The Forest Service's EIS contains scattered pages in which they enumerate possible mitigation measures and identify mitigation goals that would be necessary to prevent excessive adverse impacts. These various discussions, however, are presented in very general terms, lacking both a detailed description of required or possible mitigation measures, and any analysis as to the effectiveness of these measures.

The Forest Service argues that further specificity as to the mitigation measures for on-site impacts can only be provided when the permittee presents a master plan of development. The Forest Service also maintains that they have satisfied the mitigation discussion requirement for another reason. In its EIS, there is a brief discussion of measures that *could be* required by local government to mitigate off-site impacts. Pursuant to this discussion, the Forest Service executed a Memorandum of Understanding (MOU) with Okanogan County, the Washington Department of Ecology, and the Environmental Protection Agency. In very general terms, the MOU identifies mitigation tasks and assigns responsibilities to various parties.

It is true that contractual obligations to insure the mitigation of adverse environmental consequences may not be a prerequisite to a statutorily adequate EIS. *Preservation Coalition, Inc. v. Pierce,* 667 F.2d 851, 860 (9th Cir. 1982) (When efforts to mitigate the adverse environmental effects are "to be undertaken by third parties, their commitments, while they need not be contractual, must be more than mere vague statements of good intentions.") (citation omitted). However, the MOU offers no assurance whatsoever that the vague mitigation objectives



it features—performance of almost all of which would be the responsibility of third parties to the permit process—would ever in fact be achieved or even that effective measures would ever be designed (let alone implemented), if the Early Winters development were to proced. *Cf. Preservation Coalition*, 667 F.2d at 860 ("Since many of the 'mitigations' proposed by the agency were . . . potential actions to be taken by [third parties] reliance on them . . . was improper.") (footnoted omitted).

As this court stated in *Oregon Natural Resources Council v. Marsh,*

> [t]he importance of the mitigation plan cannot be overestimated. It is a determinative factor in evaluating the adequacy of an environmental impact statement. Without a complete mitigation plan, the decisionmaker is unable to make an informed judgment as to the environmental impact of the project—one of the main purposes of an environmental impact statement.

820 F.2d at 1055 (citation omitted). The EIS's discussion of mitigation measures is inadequate as a matter of law.

## IV.

The decision of the district court is reversed and remanded for entry of appropriate relief in accordance with this opinion.

**APPENDIX B**

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

No. 85-2124-DA

METHOW VALLEY CITIZENS COUNCIL, ET AL., PLAINTIFFS,

*v.*

REGIONAL FORESTER, ETC., ET AL., DEFENDANTS.

[June 25, 1986]

**OPINION AND ORDER**

DALE, Magistrate

**I.** ***Introduction***

This is an action for judicial review of the Record of Decision dated July 5, 1984, by United States Forest Service Regional Forester Jeff M. Sirmon to issue a 30-year special use permit for a large ski development.[1] The development, to be known as Early Winters, is planned for location on Sandy Butte in the Okanogan National Forest near Mazama, Washington. Sandy Butte is near Washington State Highway 20 at the upper end of the Methow Valley on the east side of the North Cascade Mountains. The area is—in a word—pristine.

[1] Defendant Coston has since become the Regional Forester. The Record of Decision was signed on July 5, 1984. It was announced August 10, 1984. Plaintiffs filed an administrative appeal. *See* 36 C.F.R. § 211.18. Substantial wrangling ensued about the timeliness of the appeal (*See* A.R. 4-10). Ultimately, plaintiffs filed a lawsuit in this court regarding the issue. The Forest Service retreated on the eve of a hearing for summary judgment and allowed the appeal. Max Peterson, Chief of the Forest Service, heard plaintiffs' appeal. (A.R. 12). On December 16, 1985, Peterson affirmed the July 15, 1984, Record of Decision in all respects. (A.R. 57). The Secretary of the Department of Agriculture declined to review Peterson's decision. (A.R. 58). *See* 36 C.F.R. § 211.189(f)(2). This action was filed on December 17, 1985.

All citations to "A.R." refer to consecutively numbered tabs in the three-volume administrative record, a part of the trial record marked as government's exhibit 102. The EIS is marked as government's exhibit 101.

The following glossary of abbreviations and acronyms used in this opinion is provided for the convenience of the reader:

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| APA | Administrative Procedures Act. |
| CEQ | Council on Environmental Quality |
| EIS | Environmental Impact Statement |
| MOU | Memorandum of Understanding |
| MRI | Methow Recreation, Inc. |
| MUP | Multiple-Use Plan |
| MVCC | Methow Valley Citizens Council |
| NEPA | National Environmental Policy Act |
| NFMA | National Forest Management Act |
| PSD | Prevention of Significant Deterioration |
| TSP | Total Suspended Particulates |
| T-W-C MUP | Twist-Winthrop-Concully MUP |



**II.** ***Procedural posture***

In a previous opinion dated April 30, 1986, I identified the parties and briefly summarized the claims in the complaint. Plaintiffs are public interest and environmental groups concerned variously with the protection of the environment, social, and economic amenities and resources of the Methow Valley. Some of the members of these groups reside in Methow Valley. Others use Methow Valley for recreational, educational, scientific or employment purposes. The group in the forefront of the controversy regarding Early Winters is Methow Valley Citizens Council (MVCC). Defendants are various United States Forest Service officials and the probable developer of Early Winters, Methow Recreation, Inc. (MRI).

In response to the various pretrial motions then before me and for reasons explained in the opinion, I granted summary judgment to the defendants on two claims. I held that the Forest Service had not violated either 1) the National Forest Management Act of 1976 (NFMA), 16 U.S.C. §§ 1600-1614 and other scattered sections of 16 U.S.C. or 2) the Clean Air Act as amended, 42 U.S.C. §§ 7401-7626. I denied summary judgment on all remaining claims.

A court trial was held on issues identified in a pretrial order signed by all of the parties and approved by the court. First, plaintiffs contend that the Forest Service Record of Decision to issue the permit must be set aside because it was arbitrary and capricious and not supported by substantial evidence. Second, they argue that a change in agency position on delaying the release of the environmental impact statement and Record of Decision violated their constitutional right to due process. Third, they argue that the environmental impact statement, entitled "Early Winters Alpine Winter Sports Study" (the EIS), is inadequate under the National Environmental Policy Act of 1969, (NEPA), 42 U.S.C. §§ 4231-4370a and associated regulations. I find for the defendants on all claims. The Record of Decision stands. The action is dismissed.

**III.** ***Background***

To put this case in perspective, it is necessary to begin with a rather extensive background section. MRI applied for a permit to develop and operate Early Winters on approximately 3,900 acres in the Okanogan National Forest, a forest which contains approximately 1,706,000 acres of land, on August 21, 1978. The Early Winters project had its genesis many years before that time, however. In the



early 1960s, federal study teams began surveying the North Cascade Mountains for possible designation of national park and wilderness areas. Aware of the federal effort, ski industry representatives conducted their own surveys of potential ski areas in the western United States. From these surveys, Sandy Butte emerged as a potential site for a desirable ski area. (A.R. 46A).

In 1968, Congress designated the North Cascades National Park. 16 U.S.C. § 90. The legislation directed the Secretaries of Agriculture and Interior to "agree on the designation of areas within the park on recreation areas or within national forests adjacent to the park and recreation areas needed for public use facilities. . . . [S]uch public use facilities, including . . . lodges, campsites, and ski lifts, shall be constructed according to a plan agreed upon by the two Secretaries." 16 U.S.C. § 90d-3. The national park legislation referred to above led to joint study by the National Forest and National Park Services of potential winter sports activities and sites in the North Cascades area and to the development of a North Cascades Recreation Plan. (A.R. 57 at 2).

In 1970, the Forest Service completed a work entitled the North Cascades Winter Sports Study. (A.R. 43C). It examined the opportunities for cross-country skiing, expansion of existing downhill ski resorts, and the development of new skiing facilities. This study identified Sandy Butte as having the highest potential of any site in the State of Washington for development as a major destination ski area. (A.R. 57 at 2).

In 1974, the Park Service and the Forest Service issued the Joint Plan for the North Cascades area. (A.R. 21A). Like the studies that had preceded it, this plan recognized Sandy Butte as a promising site for downhill skiing facilities. (A.R. 21A at 33).

In 1976, Congress enacted the NFMA. In 1977, the Okanogan Forest Supervisor adopted the Twisp-Winthrop-Concolly Unit Plan (T-W-C MUP). The MVCC appealed the approval of the multiple use plan (hence "MUP") to the Regional Forester. The plan was ultimately remanded because of deficiencies in the planning process, particularly the T-W-C MUP's treatment of roadless areas. (A.R. 57 at 3).[2]

Because the T-W-C MUP never went into effect, the previous plans, including the 1968 Winthrop MUP with its 1970 revision as well as the 1974 Joint Plan for the North Cascades, remained in force.

At the time the T-W-C MUP was remanded, Phase II of the Roadless Area review [*sic*] and Evaluation (RARE II) was well underway.[3] Under the RARE II project, the Forest Service inventoried all roadless areas within the National Forest System, some 190 million acres containing 154 National Forests and 19 National Grasslands. RARE II allocated all roadless areas to one of three planning categories: wilderness, nonwilderness, and future planning. Controversy arose about what a nonwilderness designation meant. California brought suit against the Forest Service, claiming that the EIS was inadequate because it failed to make site specific evaluations. In 1979, a district court agreed and enjoined the Forest Service from taking any action that might change the wilderness

[2] A "roadless area" is defined as "[a]n area of undeveloped Federal land within which there are not improved roads maintained for travel by means of motorized vehicles intended for highway use." FSM § 8260(B)(3)(1). *Northwest Indian Cemetery Protective Association v. Peterson*, 764 F.2d 581, 583 n.1 (9th Cir. 1985).

[3] The Forest Service's efforts in RARE II's precursor, RARE I, were halted when a federal court enjoined development pursuant to the plan until the Forest Service completed an EIS. *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973).



character of the disputed areas in California until it filed an EIS that satisfied NEPA's requirements. The Ninth Circuit affirmed. *California v. Block*, 690 F.2d 753 (9th Cir. 1982). The precarious legal foundation on which RARE II found itself brought the ill-fated program to an effective halt in states outside California.

MRI applied for a special use permit in 1978. The Forest Supervisor announced his decision to study the feasibility of a ski area at Sandy Butte. MVCC appealed the decision to accept and process the permit application. The Chief Forester concluded that MRI's application could be processed if development was consistent with existing plans and satisfied all procedural requirements, including NEPA. Former Department of Agriculture Assistant Secretary M. Rupert Cutler affirmed the Chief Forester's decision. However, he directed the Chief to "ensure that such applications are not approved until the area is appropriately allocated in a land management plan and the project considered through the appropriate environmental review process." (A.R. 4A at 2). By the time the appeal reached Cutler, work on the T-W-C plan had been dropped in favor of drafting the Okanogan NFMA plan. The Regional Forester made inquiries whether the 1968, 1970 Winthrop MUP satisfied Cutler's directive quoted above. Associate Deputy Chief Housley responded with a simple answer: "No." (A.R. 4B). Housley was concerned primarily with the fact that no decision had yet been made as to whether to allocate Sandy Butte for wilderness land. It seems fair to say that Housley interpreted Cutler's decision to allow study of the permit application, but not to issue the permit until the Okanogan NFMA plan (in which allocations to wilderness would be made) was complete.

The Forest Service proceeded simultaneously with consideration of MRI's permit application and with preparation of its NFMA plan for Okanogan National Forest. A

draft EIS for the Early Winters proposal and a separate draft EIS for the NFMA plan were published simultaneously in 1982. The Early Winters Draft EIS chose alternative five (a larger development than that selected in the Final EIS). The NFMA plan EIS allocated the land around Sandy Butte as "Roaded Recreation," which was defined as compatible for ski area development. (A.R. 21D at 2). Hundreds of public comments were received. In the wake of the Ninth Circuit's decision in *California v. Block*, the Forest Service decided to start over on the NFMA plan. The Final EIS on Early Winters was completed in due course but not released, apparently because the Forest Service was concerned that release would be incompatible with the Cutler decision.

Cutler's successor, John Crowell, received a letter from Washington Congressman Sid Morrison, which raised inquiries regarding the delay in releasing the Final EIS. Crowell expressed concern that release of the Early Winters EIS prior to appropriate resolution of the issue of whether Sandy Butte would be designated as wilderness would be successfully challenged in court under the principles of *California v. Block*. He stated: "A substantial amount of time would be needed to revise the Sandy Butte FEIS to address the question of whether or not the site should be designated wilderness. This is valuable time which would be better spent on expediting completion of the [Okanogan] Forest [NFMA] Plan." (A.R. 210 at 1). He went on to state that Congress could solve this problem through passage of a satisfactory Washington Wilderness Act. (*Id.* at 2).

MVCC was aware of these developments. In a letter to Cutler dated June 8, 1984, the author indicated that an amendment to the Washington Wilderness Bill had been added "that would alter the intent and effect of your ruling." (A.R. 21D at 1). The letter goes on to state: "Your



successor in the Reagan Administration is interpreting your decision as appropriate only because the roadless lands involved were not considered for wilderness designation in Rare II." (*Id.*) MVCC indicated it did not feel "that the passage of the Washington Wilderness Bill fulfills the intent of the Cutler Decision and hope that you will lend your support at this time in upholding that decision." (*Id.* at 2).

The Washington State Wilderness Act, Pub. L. No. 98-339, 98 Stat. 299 (Washington Wilderness Act) became law on July 3, 1984. It designated various public lands in Washington as wilderness. Sandy Butte was purposefully not among those chosen. Recognizing that the NFMA authorized continued management of forest lands under existing land and resource plans pending the completion of forest plans, the Senate Committee Report accompanying the wilderness bill through Congress specified the management direction for Sandy Butte:

> That area of the Okanogan National Forest known as Sandy Butte has been excluded from wilderness designation in S. 837. It is the intent of Congress that land use management of Sandy Butte proceed, without delay, in accordance with existing multiple-use management plans, consistent with the National Environment Policy Act (NEPA). The designation by Congress in S. 837 of appropriate wilderness areas in Washington State makes it unnecessary to further withhold the Sandy Butte/Early Winters Alpine Winter Sports Study FEIS pending completion of the Okanogan Forest Plan. The Forest Service and the Department of Agriculture are directed to allow the evaluation process for the Sandy Butte development to proceed without additional delay, given that Congress has determined that the roadless upper third of Sandy Butte is without wilderness characteristics.

(A.R. 21F at 11); S. Rep. No. 461, 98th Cong., 2d Sess. 11 (1984).

With these facts in mind, I now turn to a discussion of plaintiffs' claims. Additional facts will be discussed below as they become necessary.

## IV. *Discussion*

### A. *Was the Forest Service decision to issue the special use permit arbitrary and capricious?*

Plaintiffs claim that the Regional Forester's decision should be set aside because he acted arbitrarily and capriciously and did not rely on substantial evidence in reaching the decision to issue the special use permit. As a threshold matter, I must determine whether the court has the power to review this contention in the context presented in the pretrial order.

The Administrative Procedures Act (APA), provides:

> (a) This chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.

5 U.S.C. § 701(a).

No statute precludes judicial review of the Forest Service's Record of Decision. The court is concerned here with the exception in § 701(a)(2). In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), the Supreme Court emphasized that the § 701(a)(2) exception where "agency action is committed to agency discretion by law" is "a very narrow exception . . . applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " 401 U.S. at 410 (citation omitted).

In *Ness Investment Corp. v. United States Department of Agriculture*, 512 F.2d 706 (9th Cir. 1975), plaintiff



sought review of a Forest Service decision that a company was unqualified to receive a special use permit to operate a resort. In that case, the Forest Service action was authorized and taken pursuant to statutory authority provided in 16 U.S.C. § 497. The company argued that § 701(a)(2) did not apply. The court disagreed. "The statute, [16 U.S.C. § 497], is with respect to the proper recipient of a special use permit, drawn in such broad terms that there is no law to apply." *Id.* at 715. *Contra Sabin v. Butz*, 515 F.2d 1061, 1067 (10th Cir. 1975).

Subsequent Ninth Circuit cases have not interpreted *Ness* to mean that judicial review of agency action taken pursuant to 16 U.S.C. § 497 or similar broadly-worded discretionary statutes is completely foreclosed in all circumstances. As one of these decisions stated:

> In considering whether administrative action is "committed to agency discretion by law" within the meaning of the APA, the test "is not whether a statute viewed in the abstract lacks law to be applied but rather, whether '*in a given case*' there is no law to be applied." *Strickland v. Morton*, [519 F.2d 467, 470 (9th Cir. 1975)] (emphasis in original). Thus the existence of some law generally applicable to the subject matter in question will not necessarily remove administrative action from the "committed to agency discretion" rubric. There is "law to apply," only if a specific statute limits the agency's discretion to act in the manner which is challenged.

*Santa Clara v. Andrus*, 572 F.2d 660, 666 (9th Cir.), *cert. denied sub nom, Pacific Gas & Electric Co. v. Santa Clara*, 439 U.S. § 859 (1978).

The discretion afforded the Forest Service is not limited to the mere identification of a qualified recipient of a permit; it extends equally to the more basic decision to issue

any permit at all. Plaintiffs' challenge—however phrased—is essentially a claim that the Forest Service had either no basis or relied on an improper basis in reaching the decision on whether or not to issue the permit for Early Winters. That decision is "committed to agency discretion" and is not reviewable. *Ness*, 512 F.2d at 715. *See also Arizona Power Authority v. Morton*, 549 F.2d 1231, 1239 (9th Cir.), *cert. denied*, 434 U.S. 835 (1977). *But cf. Sierra Club v. Clark*, 774 F.2d 1406, 1408 (9th Cir. 1985) (environmental challenge to Bureau of Land Management decision to amend California Desert Conservation Area Management Plan pursuant to Federal Land Policy and Management Act of 1976; agency's factual findings in support of decision to be overturned only "if arbitrary and capricious" *citing Sierra Club v. Clark*, 756 F.2d 686, 691 (9th Cir. 1985) and 5 U.S.C. § 706(2)(A).

Under the circumstances presented in this case, there is no law to apply as to the propriety of the challenged decision. *Ness* and its progeny necessitate the conclusion that § 701(a)(2) deprives the court of any power to consider plaintiffs' contentions.[4]

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[4] If the case law of the Ninth Circuit allowed the court to engage in a substantive review of the Regional Forester's decision, I would affirm it because it is neither arbitrary nor capricious. 5 U.S.C. § 706(2)(A). It is not the court's place to substitute its judgment for that of the agency on the decision to issue the permit. The decision reached is without doubt a rational and lawful one. The substantial evidence test of 5 U.S.C. § 706(2)(E) does not apply to either the issue of the propriety of the decision or the adequacy of the EIS under NEPA because the Regional Forester's decision is not a "case" that is "subject to" formal adjudicatory hearings or formal rule-making required by 5 U.S.C. §§ 556, 557. *Ethyl Corporation v. Environmental Protection Agency*, 541 F.2d 1, 37 n.79 (D.C. Cir.) (en banc) *cert. denied sub nom, E. I. duPont deNemours & Co. v. Environmental Protection Agency*, 426 U.S. 941 (1976). *See generally* D. Mandelker, NEPA Law and Litigation, § 3:04 at 8 (1984).



**B.** ***Did "reversal" of the "Cutler Decision" deprive plaintiffs of any due process rights?***

Plaintiffs claim that the reversal of the Cutler Decision denied them due process under the fourteenth amendment to the United States Constitution. Unlike the first claim, here there is law to apply. *Ness* does not preclude review. In my April 30 opinion, I stated that the Washington Wilderness Act "appears" to have modified former Assistant Secretary Cutler's decision to refrain from making any decision on issuance of a special use permit pending completion of the Okanogan NFMA plan. However one interprets the scope of the Cutler Decision, it is undeniable that the Senate report gives a clear indication that Congress *itself* had made the determination that Sandy Butte did not possess wilderness characteristics, one of the prime issues in the Okanogan NFMA plan, and that the Forest Service should proceed with land use management of Sandy Butte in a manner consistent with existing multiple use plans without waiting for the Okanogan NFMA plan.

Assuming, without deciding, that plaintiffs have a protected fourteenth amendment interest at stake, a doubtful assumption, plaintiffs have not been denied due process in either a procedural or substantive sense. The MVCC letter to Cutler makes clear that they were aware of the pending legislative action. (A.R. 21D). Nor can it be said that the change in Forest Service policy is somehow "arbitrary or capricious" or that the Forest Service was required to give any explicit basis for the change in its policy. Congressional directive is reason enough.

**C.** ***Was the EIS adequate under NEPA?***

This claim is the heart of what remained in the case after my rulings on the summary judgment motions. I will candidly admit that I found the factual material as well as

some of the environmental statutes, e.g., the Clean Air Act, complex; the legal argument, at times, difficult to follow; and the Ninth Circuit NEPA precedents lacking in adequate guidance from a trial judge's perspective, particularly on evidentiary issues. Despite these admissions, or more precisely because of them, I have given plaintiffs' NEPA claim extensive consideration. However, applying the applicable statutes, regulations and precedents as I understand them, I find that the EIS is adequate in all respects.[5]

"The purpose of NEPA is to assure that federal agencies are fully aware of the impact of their decision on the environment." *Friends of the Endangered Species v. Jantzen*, 760 F.2d 976, 985 (9th Cir. 1985). To effectuate NEPA's purpose, Congress requires that federal agencies prepare an EIS where "major Federal actions [will] significantly affect[ ] the quality of the human environment." 42 U.S.C. § 4332(2)(C). The EIS is designed to serve two basic functions. First, it "should provide decision-makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in light of its environmental consequences." *Trout Unlimited v. Morton*, 509 F.2d 1276, 1282 (9th Cir. 1974). Second, the EIS should "provide the public with information on the environmental impact of a proposed project as well as encourage public participation in the development

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[5] The Council on Environmental Quality (CEQ) has promulgated regulations applicable to and binding upon all federal agencies for implementing the procedural provisions of NEPA. 40 C.F.R. § 1500.3 (1985); *see* 40 C.F.R. §§ 1500-1508. In the words of the CEQ, the purpose of the regulations is to tell federal agencies what they must do to achieve the goals of NEPA. 40 C.F.R. § 1500.1(a). I grant substantial deference to these regulations as the authoritative guide for NEPA's interpretation. *California v. Block*, 690 F.2d 753, 763 (9th Cir. 1982) *citing Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).



of that information." *Id.*; *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1056 (9th Cir. 1985).

There is no contention in this case that the Forest Service did not observe the purely procedural requirement of NEPA, in terms of the timing of its public announcements and the like. The issue is solely one of adequacy of the impact statement itself. The adequacy of an agency's preparation of an EIS is reviewed under 5 U.S.C. § 706(2)(D). *Enos v. Marsh*, 769 F.2d 1363, 1372 (9th Cir. 1985); *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974) (subsequent history omitted). In passing on the adequacy of the EIS under § 706(2)(D), the court must

> employ a "rule of reason" that inquires whether an EIS contains a "reasonably thorough discussion of the significant aspects of the probable environmental consequences." *Trout Unlimited, Inc. v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974). [Sic]. This standard is not susceptible to refined calibration. It instead requires a reviewing court to make a pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and public participation. *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 552 (9th Cir. 1977) (per curiam); *Trout Unlimited, Inc.*, 509 F.2d at 1283. [Sic]. This standard of review, however, does not authorize a reviewing court to substitute its judgment for that of the agency concerning the wisdom or prudence of a proposed action. Once satisfied that a proposing agency has taken a "hard look" at the decision's environmental consequences, the review is at an end. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 [] (1976).

*California v. Block*, 690 F.2d at 761.

With these standards in mind, I now turn to plaintiffs' specific challenges to the EIS.

1. *Alternatives*

NEPA requires that an EIS provide information in detail on alternatives to the proposed action. 42 U.S.C. § 332(2)(C)(iii); 40 C.F.R. 1502.14.[6] Plaintiffs contend the EIS's discussion of alternatives is inadequate because there is no detailed discussion in the EIS of expanding existing ski sites in Washington States as an alternative to developing Sandy Butte.

*Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051 (9th Cir. 1985) involved a challenge to a Department of Interior proposed action to route a direct-current transmission line on multistory towers through Henderson, Nevada. The EIS gave detailed consideration to ten alternative segments of the approved route. Not one of these segments resulted in a route that avoided Henderson. Henderson contended that another route that avoided Henderson was reasonable and should have been given detailed consideration in the EIS. *Id.* at 1053, 1057.

The trial judge, after a trial on the merits, found that the Henderson route was superior. The Ninth Circuit panel sharply criticized this approach to resolving the challenge to the EIS. "[T]he superiority of the preferred route is irrelevant to the reasonableness of the omitted alternative route." *Id.* at 1057. "The question for the district court, therefore, was whether [the route that avoided Henderson] was reasonable." *Id.* Discussion of the superiority of one route over another was apparently tantamount to substitution of the court's judgment for that of the agency, a practice forbidden by *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). *See also Adler v. Lewis*, 675 F.2d 1085, 1096 (9th Cir. 1982) (court review is limited to assuring that the agency "considered" the environmental consequences of its proposed action).

[6] All C.F.R. citations are to the 1985 edition.



Reasonableness cannot be discussed in a vacuum. There must be some benchmark against which the court can measure the reasonableness of an agency decision to forego discussion, detailed or otherwise, of a given alternative in an EIS.[7] The cases demonstrate that reasonableness of alternatives is measured largely in response to the scope of the proposed action as defined by the agency. *See Friends of Endangered Species v. Jantzen*, 760 F.2d at 988; *California v. Block*, 690 F.2d at 766-67; *Save Lake Washington v. Frank*, 641 F.2d 1330, 1334 (9th Cir. 1981); *Brooks v. Coleman*, 518 F.2d 17, 18-19 (9th Cir. 1975) (per curiam). *Accord Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 836-38 (D.C. Cir. 1972).

As Judge Burns recently noted, for purposes of judicial review

> it must be remembered that the scope of the EIS is largely determined by the scope of the proposed action itself and the rule of reason. . . . [W]here the proposed action is vast in scope, covering a large project or program, NEPA's policy will obviously demand more than the EIS in the way of specificity and range of alternatives than where the proposed action is more modest in its scale.

*Natural Resources Defense Council, Inc. v. Hodel*, 624 F. Supp. 1045, 1050-51 (D. Nev. 1985) (Burns, J. sitting by designation) (NEPA challenge to adoption of site-specific land use plan for Bureau of Land Management grazing allotment). *Compare id. with California v. Block*, 690 F.2d 753 (9th Cir. 1982) (NEPA challenge to adoption of

[7] The uninitiated might think that one component of the inquiry in *Henderson* regarding the reasonableness of an alternative route would be the relative superiority of a Henderson route over a route that bypassed Henderson.

plan to classify 62 million acres of roadless land for wilderness or other purposes, potentially irreversible if development proceeded on erstwhile roadless area). An agency need only set forth "those alternatives necessary to permit a 'reasonable choice.'" *National Resources Defense Council, Inc. v. Hodel* [624 F. Supp.] at 1051 *citing California v. Block*, 690 F.2d at 767 and *Save Lake Washington*, 641 F.2d at 1334. Stated another way, "[t]he range of alternatives that must be considered need not extend beyond those reasonably related to the purposes of the project." *Trout Unlimited*, 509 F.2d at 1286.

The proposed action in this case is whether to build a destination ski resort in the Okanogan National Forest. For purposes of this opinion, it is sufficient to state that a "destination ski resort" in general terms is a large, multi-season, recreation ski area with numerous runs and sufficiently varied activities and base facilities of a sufficient quality to entice vacationers to stay several days at the site.[8]

The Early Winters EIS discussed five alternatives in detail. The first was no action. Under this alternative, no special use permit would have issued and no development would have been allowed. Alternatives two through five contemplated increasingly larger developments ranging from 2,300 to 10,500 skiers at one time. The preferred alternative in the EIS was the fourth alternative, which would permit a phased development over several years ultimately allowing 8,200 skiers at one time. The Regional Forester selected this preferred alternative in the Record of Decision.[9]

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[8] The parties' dispute over this nonissue was particularly tedious.

[9] The Forest Service indicated that it preferred alternative five in the Draft EIS. The Record of Decision states that alternative one (no action) was environmentally preferred because it would cause the least disruption to the natural environment. Alternative five would provide maximum utilization of the recreation resource opportunities and increased economic benefit to the area. Alternative four was chosen because "it provides a balance of concerns for the physical and biological components of the human environment in addition to concerns for social and economic welfare." (A.R. 2 at 2a).



The tone of plaintiffs' alternatives argument makes it sound as if other sites were simply ignored by the Forest Service. This is not the case. The EIS itself indicates that sites in the Okanogan National Forest other than Sandy Butte were considered. (EIS at 6-7). These alternative sites were eliminated from detailed study in the EIS. *See* 40 C.F.R. § 1502.14(a).

The primary reason given in the EIS for elimination of detailed discussion of expansion of alternative sites was that the North Cascade Winter Sports Study, a work cited in the EIS and available to the public, had identified Sandy Butte as the only area in the Okanogan Forest having good potential as a major ski development.

The EIS also stated that it did not consider expanding existing sites elsewhere in Washington because the EIS was specifically tailored to development of Sandy Butte. Plaintiffs focus on this latter reason and contend that omission of detailed discussion of alternative sites outside the Okanogan National Forest renders the EIS inadequate. I cannot agree.

Sites a hundred or more miles away from the Okanogan National Forest are not reasonable alternatives to the development of a ski resort at Sandy Butte. It was not unreasonable for the Forest Service to forego detailed discussion of expanding sites outside the Okanogan. As the CEQ has recognized in explaining its own regulations concerning alternatives in the context of licensing and permitting situations, a decision-maker need not "disregard the applicant's purposes and needs and the common sense

realities of a given situation in the development of alternatives." CEQ Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34263, 34267, *citing with approval Roosevelt Campobello International Park Commission v. EPA*, 684 F.2d 1041 (1st Cir. 1982) (EPA licensing of refinery and deep-water petroleum terminal). The EIS need only set forth those alternatives "sufficient to permit a reasoned choice." *Life of the Land v. Brinegar*, 485 F.2d 460, 472 (9th Cir. 1973) *quoting Natural Resources Defense Council v. Morton*, 458 F.2d at 834.

Consistent with the teachings of *Better Henderson* and *Kleppe* and given the record before me, I conclude that expansion of existing sites was not a reasonable alternative requiring detailed discussion in the EIS.

2. *General observations regarding adequacy*

The bulk of plaintiffs' remaining attack challenges the adequacy of the EIS discussion of "secondary" or "indirect" impacts. Indirect impacts are not those impacts caused by the construction of runs, and ski lifts and the like on Forest Service lands. In NEPA nomenclature, such effects are known as "primary" or "direct" impacts. *See generally* D. Mandelker, NEPA Law and Litigation, §§ 10:28 and 10:36 (1984). Indirect impacts are those from development on primarily private property that are expected to follow construction of the ski resort. Most of this development is dependent on local development and zoning policies. The forecasting of secondary impacts is generally more speculative than forecasting of primary impacts. Courts, in applying the rule of reason, take the uncertainty and speculation involved with secondary impacts into account in passing on the adequacy of the discussion of secondary impacts in an EIS. *See Enos v. Marsh*, 769 F.2d at 1373. This policy applies with equal



force to mitigation measures of secondary impacts. *See id.*

The rule that courts are not to "fly-speck" an EIS, *Lathan v. Brinegar*, 506 F.2d at 693, but rather to satisfy itself [*sic*] that the EIS has reasonably set forth sufficient information to enable the decision-maker to consider the environmental factors and make a reasoned choice, *Adler v. Lewis*, 675 F.2d at 1096, also bears repeating.

3. *Mule Deer*

Plaintiffs contend that the EIS discussion of the direct and secondary impacts of the development on the valley's mule deer herd is inadequate. Plaintiffs also contend that the Forest Service was required to prepare a worst case analysis regarding the effect of the development on the deer herd. Finally, plaintiffs contend that the Forest Service had a duty to analyze proposed mitigation measures to lessen the impact of the development on the deer herd.

a. *Inadequate discussion of impact on mule deer.*

The EIS discussed deer impacts both on-site and off-site. It indicated that adoption of any of the four development alternatives would disturb resident mule deer habitat during the summer and fall. The Forest Service estimated that summer habitat on-site would decrease from seven to ten percent depending on which alternative was chosen. The EIS also discusses the impact of the development on winter habitat and fawning. (EIS at 75-76). In making these conclusions, the EIS depended in large part on a 1975 study and on a 1978 study by D. L. Zeigler.

The EIS acknowledged that discussion of off-site impacts on deer herds was more difficult because of uncertainty about where other public and private lands may ultimately be developed. (EIS at 76). The Record of Decision, it will be remembered, merely authorizes the issuance

of the permit. Actual construction of the resort must be preceded by an acceptable master development plan. The EIS did proceed to indicate that the off-site development would decrease the existing herd. (*Id.*).

Plaintiffs challenge the quality of the Zeigler studies as well as the EIS discussion on deer impacts. They contend that the Forest Service was obligated to obtain missing data. CEQ regulations require that agencies include information relevant to adverse impacts which is essential to a reasoned choice among alternatives if the cost of obtaining such information is not exorbitant. 40 C.F.R. § 1502.22(a). I find that the essential information relevant to a reasoned choice among alternatives was known and discussed. Plaintiffs bear the burden of proof to show that studies, models and the like are inadequate. They have not met their burden. I find the studies and the EIS discussion on deer impacts adequate under the rule of reason.

b. *Failure to prepare a worst case analysis.*

This argument is related to the preceding argument. CEQ regulations provide that a worst case analysis must be prepared in certain circumstances. A worst case analysis is not required unless information relevant to a reasoned choice among alternatives is not known and the cost of obtaining it is exorbitant. Alternatively, a worst case analysis is required if information relevant to adverse impacts is important to the decision and the means of obtaining it are unknown. 40 C.F.R. § 1502.22(b). Neither situation applies here. The relevant information essential to a choice among alternatives was known as well as the means to obtain such information. *See Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1244 n.5 (9th Cir. 1984); *cf. Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983).[10]

[10] The CEQ recently rescinded its worst case analysis regulation. The new regulation, which became effective May 27, 1986, requires that the analysis of impacts in the face of unavailable information be grounded in the rule of reason. The new rule states that "in preparing an environmental impact statement, the agency shall make reasonable efforts, in light of overall costs and state of the art, to obtain missing information which, in its judgment, is important to evaluate significant adverse impacts on the human environment that are reasonably foreseeable." 51 Fed. Reg. 15618 (1986). I have not applied the new regulation in my analysis.



c. *Duty to analyze mitigation measures.*

NEPA requires a discussion of "any adverse environmental effects which cannot be avoided." 42 U.S.C. § 4332(2)(C)(ii). The CEQ regulations require that an EIS section on environmental consequences must "include a discussion" of [m]eans to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f))." 40 C.F.R. § 1502.16(h). Section 1502.14(f) provides that the EIS section on alternatives must contain "appropriate mitigation measures not already included in the proposed action or alternatives" 40 C.F.R. § 1502.14(f). Mitigation as used in the regulations is defined in 40 C.F.R. § 1508.20.

Mere listing of mitigation measures in an EIS is generally inadequate to satisfy the CEQ regulations. *See Northwest Indian Cemetery Protective Association v. Peterson*, 764 F.2d 581 (9th Cir. 1985). However, in this EIS there is more—not much more—but more than a mere listing of mitigation measures as to the deer herd. To be sure, the mitigation discussion on deer herds and on all other adverse environmental impacts could have been more extensive. More important, however, is the recognition that formulation of at least some mitigation strategies logically must follow submission of the master development plan. Moreover, the Forest Service is currently in the process of developing mitigation measures as information becomes

available based on a new study. *See Oregon Natural Resources Council v. Marsh*, 628 F.Supp. 1557, 1565 (D. Or. 1986).

The Record of Decision requires, as a condition to issuance of the special use permit, that the Forest Service enter into an agreement with the Washington Department of Game and Okanogan County to develop actions to mitigate effects of development on the mule deer herd. In response to the conditions imposed by the Record of Decision, various federal, state and local agencies have signed a Memorandum of Understanding (MOU) to develop a plan to mitigate impacts on mule deer. To implement the MOU, the Forest Service and the Washington State Department of Game have undertaken an extensive study of mule deer habitat and migratory routes in the Methow Valley. Okanogan County is also studying and considering various land use controls and other measures to mitigate any impacts of population growth and development on mule deer. The Forest Service's response demonstrates that it was informed and responsive to the public concern on the effect the project would have on mule deer. *See Sierra Club v. Clark*, 774 F.2d at 1411.

I find under the rule of reason that discussion of mitigation measures for mule deer impacts in the EIS was adequate.

4. *Air*

This claim contains several subissues. Plaintiffs contend that the EIS was inadequate on several grounds. As background to this claim, it is important to note the EIS states, and the statement has not been challenged by plaintiffs, that the ski area itself will have no measurable direct impact on air quality in the Methow Valley. The controversy over air, as over mule deer, concerns secondary impacts.



a. *Inadequate discussion of air quality impacts.*

i. *Failure to discuss certain air pollutants.*

Plaintiffs contend that the EIS is inadequate because it contains absolutely no information regarding carbon monoxide pollution resulting from woodstoves and no information regarding nitrogen dioxide pollution. Even though plaintiffs' contention of fact is correct, I find that the omission does not render the EIS inadequate. This argument strikes me as "fly-specking."[11] The evidence showed that the impacts from these pollutants from woodstoves would be relatively insignificant. The EIS does contain a brief discussion of carbon monoxide impacts. (EIS at 67). The evidence showed that nitrogen dioxide impacts would be insignificant.

ii. *Failure to measure existing concentrations of air pollutants.*

The EIS discusses the general air flow characteristics in the Methow Valley in some detail. (EIS at 26-29). More specifically, measurements of TSP were taken in both Mazama and Winthrop, two towns in the valley. Plaintiffs' argument that measurements of other pollutants, particularly carbon monoxide and nitrogen dioxide, were required to make the EIS adequate are unpersuasive. The evidence showed that nitrogen dioxide impacts would not be so significant as to warrant the type of treatment plaintiffs suggest.

iii. *Failure to discuss Clean Air Act PSD policy.*

This argument has been a moving target throughout these proceedings. In an earlier form, plaintiffs challenged

[11] The arguments on fish and water, population, and expansion of the intercity airport also strike me as fly-specking.

the EIS because it allegedly failed to discuss the Clean Air Act's PSD policy. This argument fails. The decision-makers were aware of the PSD program and presumably the broad congressional policy of nondegradation. *See,* e.g., EIS at D-44. Disclosure of physical impacts on the environment is the primary function of an EIS. NEPA does not require that an EIS contain a definitive legal brief. At closing argument, plaintiffs contended that the EIS was inadequate because it failed to inform the decision-maker that the PSD increment for TSP had been triggered. Although the materials submitted in support of the summary judgment were in dispute on this point, the evidence clearly shows that the baseline has in fact been triggered. Because of this triggering, the PSD increment for TSP is in the process of being consumed. The ski resort and the secondary development to follow may consume the TSP increment of 37 micrograms per cubic meter for the applicable Clean Air Act-geographic district. Consumption of the increment would foreclose the placement of any major emitting facility in the geographic area covered by the TSP increment. See discussion of Clean Air Act issues in April 30, 1986, opinion at 4-10. Plaintiffs, citing *Alabama Power Co. v. Costle,* 636 F.2d 323, 381 (D.C. Cir. 1979), challenge the EIS because it fails to disclose this potential foreclosure of economic opportunity in the Methow Valley. I find nothing in *Alabama Power* to support this contention. The EIS would have been better had it contained such a discussion, but given the legal ambiguities surrounding the PSD program, the omission is not fatal.

iv. *Failure to discuss impacts on Pasayten Wilderness.*

There was some dispute in the evidence concerning secondary impacts on the Pasayten Wilderness area, a Class I area near the upper tip of the Methow Valley. *See*



40 C.F.R. § 52.21(e). I find that the evidence supports the conclusion in the EIS that Class I areas will not be impacted. (EIS at 68). I find the discussion and the studies underlying such discussion adequate.

**b.** ***Failure to prepare worst cases analysis.***

No worst case analysis was necessary for reasons similar to those previously discussed in the mule deer analysis.

**c.** ***Failure to analyze mitigation measures.***

The EIS discloses the adverse impacts on air quality that are likely to occur as a result of population growth and development in the Methow Valley over the next ten to twenty years. Air quality impacts resulting from increased growth over such a period-of time is inherently speculative. *See Enos v. Marsh,* 769 F.2d at 1373. The secondary air quality impacts that may result from population growth and development in the Methow Valley were forecasted on the basis of existing information and reasonable forecasting methods. The EIS stated that the majority of those impacts would be caused by off-site combustion of wood for space heat and motor vehicle use during the operating ski reason. (EIS at 65, 68).

The EIS lists several mitigation measures to reduce air quality impacts. (EIS at 68-69). It identifies mitigation measures to be studied and implemented by Okanogan County. The Record of Decision required development of an air quality management program designed to minimize deterioration of air quality in the Methow Valley, particularly that resulting from wood smoke emissions. (A.R. 2 at 4). The Forest Service, the Environmental Protection Agency, the Washington State Department of Ecology and Okanogan County executed a MOU which represents a determination that the air pollution mitigation measures,

programs, plans and commitments identified therein will operate to prevent violation of applicable air quality standards. (A.R. 53).

I find the discussion of air mitigation measures in the EIS adequate.

5. *Remaining issues*

a. *Fish and Water*

Plaintiffs argue that the EIS is inadequate because of its failure to analyze the effectiveness of mitigation measures relating to fish and water quality impacts. The EIS states that Cedar Creek is one of the most productive trout streams in the Early Winters creek system. It analyzes in detail the increased sedimentation that could occur in Cedar Creek predominantly as a result of construction of the ski area. (EIS at 72). The EIS identifies several mitigation measures that will reduce the risk of impact on fisheries resulting from the development on Sandy Butte. Failure to discuss the effectiveness of specific mitigation measures in this EIS is understandable given the fact that effectiveness will depend on the location of facilities on the mountain. I find the fish and water discussion adequate.

b. *Population*

Plaintiffs take issue with the population growth analysis in the EIS. They complain that the population model underestimated population growth and consequently underestimated environmental damage that correlates to population growth. The discussion in the EIS is based on an extensive study performed at the request of the Forest Service. Experts disagreed over its adequacy. I find it adequate in all respects.



c. *Intercity airport*

Plaintiffs contend that the expansion of the intercity airport is closely related to the development of Early Winters, but the impacts of expansion of the intercity airport are not discussed in the EIS. Despite plaintiffs' contention, the EIS contains a rather detailed discussion of the impact of the development on air commuter activity, including activity through the intercity airport. (EIS at 117-121).

To the extent plaintiffs argue that the airport is a "closely-related" action within the meaning of 40 C.F.R. § 1508.25(a)(1) requiring a separate EIS for the airport itself, the argument fails. The intercity airport is a separate action which has no direct relationship to the project proposed by MRI. While the ski resort may have an indirect effect on the airport, the actions are not "connected." *See Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985).

V. *Conclusion*

Any issue I have neglected to discuss explicitly lacks merit. This opinion constitutes findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

In summary, I conclude: 1) that the substantive merits of the Record of Decision are not subject to judicial review under Ninth Circuit precedent, 2) that plaintiffs did not suffer any deprivation of due process, and 3) that the Early Winters EIS complies fully with the requirements of NEPA. The action is dismissed. Each side is to bear its own costs.

It is so ORDERED.

DATED this 25th day of June, 1986.

/s/ William M. Dale
WILLIAM M. DALE
U.S. Magistrate

**APPENDIX C**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF OREGON**

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**Civil 85-2124-DA**

METHOW VALLEY CITIZENS COUNCIL, ET AL, PLAINTIFFS

*v.*

REGIONAL FORESTER, ETC., ET AL, DEFENDANTS

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**July 12, 1986**

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**JUDGMENT**

Based on the record,

IT IS ORDERED AND ADJUDGED the action is dismissed.

DATED: this 1 day of July, 1986.

/s/ Jeffrey Amran
Clerk



**APPENDIX D**

1570 NFS #1111
(Rn)
DEC 16 1985

CERTIFIED MAIL RETURN RECEIPT REQUESTED

Mr. David Bricklin
Suite 900, Fourth and Pike Building
1424 Fourth Avenue
Seattle, Washington 98101

Dear Mr. Bricklin:

On October 1, 1984, you requested on behalf of your clients Methow Valley Citizens Council, Washington State Sportmen's Council, Washington Environmental Council, and the Cascade Chapter, Sierra Club, pursuant to 36 CFR 211.18, a review of Regional Forester Jeff Sirmon's July 5, 1984, decision to adopt Alternative IV of the Early Winters Alpine Winter Sports Study Final Environmental Impact Statement (FEIS). Based on this decision, the Forest Service will permit development of a destination ski resort on approximately 3,900 acres of land at Sandy Butte, Okanogan National Forest, Washington. Relief requested is that the decision be reversed.

Status as an intervenor in this appeal was requested and granted to Mr. Glen Amster on behalf of his client, Methow Recreation, Inc. (MRI).

Regional Forester Sirmon signed the Record of Decision for the Early Winters FEIS on July 5, 1984. The decision was announced on August 10, 1984, and notice of availability of the FEIS was published in the Federal Register on August 31, 1984. You appealed this decision to the Chief of the Forest Service on October [illegible], 1984. MRI

was granted intervenor status on April 3, 1985. A stay of permit issuance, and any activities which would significantly disturb the site was granted on May 1, 1985. Oral presentations by appellants and intervenor were made on July 29, 1985, and the official record was closed 10 days later on August 8, 1985. At the request of both appellants and intervenor, the appeal was suspended from September 23 to December 15, 1985.

Pursuant to 36 CFR 211.18, we have conducted the review which you requested. The information submitted by you, the intervenor, and the Regional Forester has been considered.

**I. Issues**

After carefully reviewing all of the information contained in the record, we find the issues raised by this appeal can be summarized as follows:

1. Whether the Regional Forester's decision on the ski development is premature because it was made prior to and preempts decisions to be made in the Okaogan Forest Plan.

2 Whether the Winthrop Ranger District Multiple-use Plan provides for development of a major ski area at Sandy Butte.

3. Whether mitigation measures are adequate.

4. Whether the proposed use will be in the public interest.

5. Whether the proposed development is financially feasible.

6. Whether the Early Winters Alpine Winter Sports Study EIS is adequate.

7. Whether the decision is in violation of the Washington State Environmental Policy Act.



**II. Discussion**

*Whether the Regional Forester's decision on the ski development is premature because it was made prior to, and preempts decisions to be made in the Okanogan Forest Plan.* You contend that the Regional Forester's decision was premature because: (a) the Department's 1979 decision required that the Okanogan Forest Plan be completed prior to action on the MRI permit application; (b) it preempts decisions to be made in the Forest Plan; (c) because it violates requirements of NFMA; and (d) because the Washington Wilderness Act does not negate the need to complete the Okanogan Forest Plan prior to making a decision on MRI's permit application.

a. There is a long history of land use and winter sports planning for the Sandy Butte area of the Okanogan National Forest. Contemporary planning regarding Sandy Butte began in 1968 when Congress designated the North Cascades National Park. The legislation directed the Secretaries of Agriculture and the Interior to "agree on the designation of areas within the park or recreation areas or within National Forests adjacent to the park and recreation areas needed for public use facilities . . . . Such public use facilities, including interpretive centers, visitor contact stations, lodges, campsites, and ski lifts, shall be constructed according to a plan agreed upon by the two Secretaries." (16 U.S.C. § 90d-3) The National Park legislation led to several studies by the Forest and National Park Services of potential winter sports activities and sites in the area, and to the development of a North Cascades Recreation Plan.

The North Cascades Winter Sports Study, completed in 1970 by the Forest Service, examined the opportunities for cross-country skiing, expansion of existing downhill ski resorts, and the development of new skiing facilities. The

study identified Sandy Butte as having the highest potential of any site in the State of Washington for development as a major destination ski area. Page 8 of this study states: "Of the 13 sites investigated, three were rated as good, seven marginal, and three unacceptable. Of the three sites rated good, only Sandy Butte was considered to have the necessary physical features for a site of major importance."

Following the North Cascades Winter Sports Study, the National Park and National Forest Services issued the joint plan for the North Cascades area in 1974. Like the studies that had preceded it, this plan recognized Sandy Butte as a promising site for downhill skiing facilities. On Page 22 of the Plan, it is stated that: "Developments in the Granite Creek Valley/Early Valley emphasize scenic driving, picnicking, overlooks, wilderness trailheads and trails, and potential ski areas."

In April 1977, the Okanogan Forest Supervisor adopted the Twisp-Winthrop Concenully (T-W C) Unit Plan. In accordance with the 10 years of studies that had preceded it, and consistent with the previous plans in effect, the Unit Plan allocated Sandy Butte for skiing. The Methow Valley Citizens' Council (MVCC) appealed the approval of the plan to the Chief. The plan was remanded by the Chief for revision, because of some deficiencies in the planning process, particularly the plan's treatment of roadless areas.

At the time the Unit Plan was remanded, "RARE II" was well under way. The T-W C roadless areas, therefore, were studied as part of that evaluation process. Also, with the passage of the National Forest Management Act of 1976 (NFMA), the Forest Service decided that it would be more efficient if planning for the T-W C unit area occurred



through the Forest-wide planning process required by the NFMA. With the remand of the T-W C Plan and in accordance with Section 6(c) of NFMA, the previous plans, including the Winthrop Multiple-Use Plan and the Joint Plan for The North Cascades, remain in force until approval of the Okanogan Forest Plan.

Methow Recreation, Inc. submitted an application for a special-use permit to develop a ski area on portions of Sandy Butte not included in RARE II in August 1978. RARE II allocated Sandy Butte to nonwilderness, and following direction from Deputy Chief Ray Housley, that roadless areas made available for nonwilderness use by RARE II should be managed in accordance with existing multiple-use plans until suci. time as a Forest-wide plan was approved, the Forest Supervisor announced his decision to study the feasibility of a ski area at Sandy Butte.

This decision was appealed by NMCC. The Chief, in his decision, concluded that applications to develop Sandy Butte for skiing may be processed and subsequently approved if development was consistent with existing plans and all procedural requirements, including NEPA, were fulfilled. The Chief's decision was sustained by Assistant Secretary Rupert Cutler August 10, 1979. Dr. Cutler found the Chief's decision to allow applications for special-use permits at Sandy Butte was consistent with departmental policy; however, he directed the Chief to ensure that such applications were not approved until the area was appropriately allocated in a land management plan and the project considered through the appropriate environmental review process.

In response to an inquiry from Senator Henry Jackson about the delay his decision would cause, Dr. Culter suggested that the ski area study could be prepared at the

same time as the other related planning issues were resolved in the Forest Plan. In a January 29, 1980, letter to the Regional Forester, the Chief confirmed that the Regional Forester had agreed to finish the Draft Forest Plan by the end of December 1981, and the final Plan by the fall of 1982. The Chief found it was feasible to gather the necessary data for ski development project analysis concurrent with Plan development and a decision on winter sports development at Sandy Butte could be forthcoming simultaneously with the final Forest Plan and EIS. Draft Environmental Impact Statements for Early Winters and the Forest Plan were released in 1982. Work began on both Final EIS's. However, in spring 1983, the forest planning process was halted as a result of a court decision invalidating the roadless area review. The Forest was directed to prepare a new draft Forest Plan consistent with the court's direction.

Dr. Cutler's 1979 direction was modified on December 20, 1983, when Assistant Secretary John Crowell told Congressman Sid Morrison that the Sandy Butte FEIS could be released within 45 days of a signed Washington Wilderness Bill which contained adequate RARE II sufficiency and release language.

In his letter, Mr. Crowell reasoned that "while the Sandy Butte FEIS has been subjected to a project planning and public input process, it fails to address the issue of whether the roadless area in question should be considered for wilderness designation. That issue has been dealt with by consideration of the area during RARE II. Now, however, the resulting recommendation that the area not be wilderness is invalidated by the consequences of the Ninth Circuit's decision in *California vs. Block*."



Mr. Crowell continued: "Experience in recent litigation clearly indicates that a stand-alone FEIS on ski development at Sandy Butte would be successfully challenged unless the analysis deals with the wilderness issue to standards meeting the Ninth Circuit's decision in *California vs. Block*. A substantial amount of time would be needed to revise the Sandy Butte FEIS to address the question of whether or not the site should be designated wilderness. This is valuable time which would be better spent on expediting completion of the Forest Plan."

Changing conditions and philosophies often dictate that the Department modify or change its policies. In this case, Mr. Crowell exercised his prerogative to modify the policy of Dr. Cutler based on changes that had occurred in Forest planning and wilderness allocations since Dr. Cutler's 1979 decision.

Your argument that Mr. Crowell's policy change violated due process is incorrect. Appellant, MVCC, were aware of the change, as evidenced by MVCC's June 8, 1984, letter to Dr. Cutler asking his help in changing the Crowell decision and MVCC is now exercising its right to contest the decision to permit development.

b. You contend that NEPA prohibits the Forest Service from taking any action prior to completion of the Forest Plan because such action would preempt decisions to be made in the plan. The Early Winters FEIS was prepared in full accordance with NEPA, NFMA, Departmental policy, and existing plans. The purpose of NEPA is to ensure a full analysis of the impacts to the environment of a proposed action. This analysis was accomplished by the preparation of the Early Winters EIS in full compliance with NEPA. A full range of alternatives was considered in the analysis in accord with NEPA. Analysis of the Early

Winter proposal in a separate EIS subjected the proposal to much closer scrutiny than would have been possible if the proposal had been one of many complex issues analyzed in the Forest Plan.

c. You contend that allocation of land prior to completion of the Forest Plan violates NFMA. Section 6(c) of NFMA directs that "until such time as a unit of the National Forest System is managed under plans developed in accordance with this Act, the management of such unit may continue under existing land and resource management plans." There is no requirement in NFMA to halt management actions, such as processing special-use applications, pending completion of forest plans. It was not the intent of Congress to halt operations on the National Forests pending Forest Plan completion. A ski development at Sandy Butte is in full compliance with the previous plans (Winthrop Ranger District M-U Plan, pg. 6, M-U Survey Report Liberty Bell Management Unit pg. 11).

d. Your allegation that enactment of the Washington State Wilderness Act of 1984 does not negate the need to complete the Okanogan Forest Plan prior to making a decision on MRI's permit application is incorrect. The decision under appeal is to issue a 30-year special-use permit authorizing use on approximately 3,900 acres of National Forest land. The decision does not act on MRI's permit application. MRI was chosen as the only suitable applicant after the decision under appeal was made. It must be stressed that, to date, no decision has been made on MRI's application.

On July 3, 1984, the Washington Wilderness Act was signed, resolving the roadless area issue in Washington. The Legislative history of the Washington Wilderness Act contains Senate Report 86-461. This report states that it is



the intent of Congress that land use management of Sandy Butte proceed, without delay, in accordance with exisiting multiple-use management plane, consistent with NEPA. The Forest Service and Department are directed to allow the evaluation process for the Sandy Butte development to proceed without additional delay. This expression of congressional intent is clear.

Based on the above discussion, we find that Regional Forester Sirmon properly followed Department of Agriculture policy, applicable laws, and congressional direction is issuing his decision to authorize development of a destination ski resort on Sandy Butte.

2. *Whether the Winthrop Ranger District Multiple Use Plan provides for development of a major ski area at Sandy Butte.* Prior to completion of the Okanogan Forest Plan, management of the National Forest land at Sandy Butte is directed by the Winthrop Ranger District Multiple-use Plan, completed in 1968 and revised in 1970 (per NFHA as discussed in the preceding issue). The eastern portion of Sandy Butte is located in a National Forest Landscape Management Unit with the following management direction:

a. Manage for multiple use while recognizing esthetics and recreation as key uses.
b. Manage to maintain and enhance esthetic qualities in the foreground.

The western portion of Sandy Butte is located in the Liberty Bell Management Unit, with management direction (pg. 30) to:

a. Retain a near natural landscape appearance.
b. Keep developed recreation sites unobtrusive.
c. Keep well-screened developed sites designed to provide maximum capacity and convenience.

The M-U Survey Report for the Liberty Bell Management Unit (pg. 11) and the Winthrop Ranger District M-U Plan (pg. 6) specifically mention that a major ski area is a possibility, provided it is studied in detail to determine feasibility.

After carefully reviewing the M-U Plan and Survey Report for Liberty Bell Management Unit, we find that the management direction does allow development of a ski area at Sandy Butte. We also find that, in the design of the ski area, careful consideration of the visual resource must be a major consideration. The techniques for mitigating the effects of a major ski area development on the visual resource have become highly sophisticated over the last few years and are now in common use. Development of Early Winters will meet visual quality objectives through mitigation. Adequacy of these mitigation measures can only be determined later in the project planning process when more site-specific information becomes available. Mitigation measures will be supplemental or changed as necessary to achieve the desired objective.

3. *Whether mitigation measures are adequate.* The purpose of the Early Winters EIS (EIS, pg. 1) was to provide the information required to evaluate the potential for skiing at Early Winters and to assist in making a decision whether to issue a permit for downhill skiing on National Forest land. The decision does not authorize construction of a particular ski development, nor does it authorize development of any non-National Forest lands. Another environmental analysis and review will be required by the Forest Service prior to any decision to allow a specific development. The responsible State and local government agencies may require similar review of development involving matters within their jurisdiction on non-National Forest lands.



In addition to disclosing on-site impacts of the ski development, the EIS also discloses off-site impacts (FEIS, pg. 65-145). The Regional Forester determined that there would be no major on-site adverse effects resulting directly from the Federal action. He did find that there would be some adverse environmental effects from development of private land, and he prescribed actions which must be taken to mitigate these effects (Record of Decision, pg. 4a-6a).

You argue that the Regional Forester's reliance on some other agency to compel mitigation is not in the public's interest; that the Forest Service cannot delegate its duty to assure mitigation of these measures to anyone else. The amount of information provided in the FEIS must be reasonable in the light of the decision being made. The decision to be made by the Forest Service was whether to grant the special-use permit, not to permit base area development. The EIS disclosed potential off-site impacts as required by NEPA and the Regional Forester required mitigation measures. The Forest Service has no authority to force the State or county to take certain actions. By his decision, the Regional Forester has said that certain off-site mitigation must take place as part of permit issuance.

The Regional Forester complied with his duty under NEPA by informing Okanogan County of the adverse effects on the private land, and by conditioning approval of detailed mountain development upon the mitigation of these effects. Given the multi-sovereignty nature of the permit review process (FEIS, pg. 4), we find the mitigation measures adequate for this stage in the review process.

4. *Whether the proposed use will be in the public interest.* You contend that the decision was erroneous

because this proposed action was not in the public interest. In making his decision, the Regional Forester was in part guided by response from the public regarding the Early Winters proposal. The majority of respondents to the DEIS from outside Okanogan County (and total) favored development of a destination ski area. The majority of respondents from Okanogan County favored no development. The Washington State Governor has stated a majority of Washington residents favor a destination ski development. (Record of Decision, pg. 3a). This was a strong indicator of public interest. The Regional Forester correctly concluded that he must evaluate the broad public interest, and not just the local interest. We feel that, based on the information available to him, the Regional Forester correctly determined that development will be in the public interest.

5. *Whether the proposed development is financially feasible.* Your argument that the development is not financially feasible is not convincing. The Regional Forester relied on two studies (FEIS, pg 80-83) which show that the project is feasible. These studies were adequate for the level of decision to be made. As the project progresses, and more detailed information becomes available, both the Forest Service and the developer will require further financial analysis.

The Record of Decision (Para. 1, pg. 4a) states that all prospective permittees will be required to submit financial information on their ability to construct and operate ski facilities over the period of the permit. This clause will be strictly enforced.

6. *Whether the Early Winters Alpine Winter Sports Study EIS is adequate.* You contend that the FEIS was inadequate because of a failure to discuss all reasonable alternatives. For reasons explained in the FEIS, in considering alternatives, the Regional Forester eliminated from detailed study the alternatives of skiing at other sites on the Okanogan National Forest, and expansion of existing areas. Other winter sports activity on Sandy Butte was considered as part of the No Action Alternative.



We agree with this approach because the EIS was developed in response to a site-specific request for a special-use permit at Sandy Butte. The discussion of alternatives need not be exhaustive, but contain sufficient information to permit a rational choice by the decisionmaker. The range of alternatives discussed in an EIS must be bound by some notion of feasibility, and an EIS is not to be found wanting simply because it fails to include every alternative conceivable. We conclude that the range of alternatives discussed permitted a rational choice by the Regional Forester.

The Regional Forester has adequately responded to your specific concerns regarding the adequacy of the EIS in his Responsive Statement, pages 15-21. Perfection is not the test. The proper test is one of reasonableness, namely, whether the amount of information provided was reasonable in light of the decision being made. We find that the FEIS adequately discloses the impacts of the project in sufficient detail to provide the Regional Forester a reasonable amount of information upon which to base his decision.

7. *Whether the decision is in volation of the Washington State Environmental Policy Act. (SEPA)*

Your claims on this point are incorrect for two reasons. First, SEPA does not apply to decision making on Federal land. Second, SEPA is similar to NEPA, and as discussed previously, the decision was made in compliance with NEPA and, therefore, would comply with SEPA if applicable.

**IV.** ***Decision***

Based upon our review of the record, it is my decision to affirm Regional Forester Sirmon's decision and deny the specific relief which you seek. The stay granted on May 1, 1985, will remain in effect for 10 days following the date of this decision.

This decision is the final administrative determination of the Department of Agriculture unless the Secretary, on his own volition, elects to review the decision within 10 days of receipt. Pursuant to 36 CFR 211.18 (F)(2), the Secretary will not consider any request for review.

Sincerely,

/s/ L.B. Hilmon
for R. MAX PETERSON
Chief



**APPENDIX E**

## RECORD OF DECISION
USDA Forest Service

## EARLY WINTERS ALPINE WINTER SPORTS STUDY

Okanogan National Forest
Okanogan County, Washington

**Final Environmental Impact Statement**

It is my decision to select Alternative IV as the future management plan for the National Forest System lands considered in this study. Based on this decision, the Forest Service will issue a 30-year Special Use Permit authorizing use on approximately 3900 acres of land. Facilities would allow utilization by 8200 skiers at one time. If competitive interest exists, the permittee will be chosen through a prospectus (bid) process. Construction may not begin until a master development plan has been evaluated and approved.

This Environmental Impact Statement has been developed through cooperative studies conducted by the Forest Service and Okanogan County government. Studies began in 1968 following passage of the North Cascades National Park Act, *P.L. 90-544*. The Secretaries of Agriculture and Interior were directed to "agree on the designation of areas within the park or recreation areas or within national forests adjacent to the park and recreation areas needed for public use facilities and for administrative purposes by the Secretary of Agriculture or the Secretary of Interior, respectively. The areas so designated shall be administered in a manner that is mutually agreeable to the two Secretaries, and such public use facilities, including interpretive centers, visitor contact stations, lodges, campsites, and ski lifts, shall be constructed according to a plan agreed upon by the two Secretaries."

This decision authorizes developments on National Forest System lands only. Future decisions must be made by other federal, state, and local jurisdictions on plans related to this proposal. Potential impacts on lands and activities administered by these jurisdictions have been disclosed and considered by the Forest Service.

The five alternatives considered were:

*Alternative I* (No Action)—Under this proposal, the Forest Service would not issue a special use permit and no development of downhill skiing facilities would be permitted on the area commonly known as Sandy Butte. The area would be managed with the continuation of present practices.

*Alternative II* (2,300 SAOT)—This alternative would permit development of 565 acres on Sandy Butte for a day use ski area serving 2,300 skiers at one time (SAOT).

*Alternative III* (5,200 SAOT)—This alternative would permit development of 1,200 acres on Sandy Butte for a mid-level development serving 5,200 SAOT. Base facilities in support of the public land development would be located on private land near Early Winters Visitor Information Station. The design and location of support facilities on private land would require approval by Okanogan County through its land development review process.

*Alternative IV* (8,200 SAOT, Preferred)—This is the selected alternative. It will permit development of a destination ski resort on 3900 acres of Sandy Butte, serving 8,200 SAOT. The design and location of support facilities on private land would require approval by Okanogan County through its land development review process.

*Alternative V* (10,500 SAOT)—This alternative would permit development of the same National Forest System land



area as alternative IV, but more run capacity would be created. The design and location of support facilities on private land would require approval by Okanogan County through its land development review process.

When considering the physical and biological effects on the National Forest System lands to which the decision applies, Alternative I is identified as environmentally preferred. Alternative I would cause the least disruption to the natural environment.

Alternative V would provide maximum utilization of the recreation resource opportunities and increased economic benefit to the area. Alternative IV provides a balance of concerns for the physical and biological components of the human environment in addition to concerns for social and economic welfare. Those considerations which led to the selection of Alternative IV are:

The area of Sandy Butte which was studied has the necessary components to support a major development for skiing.

Studies indicate that a ski area of this size is economically feasible at this location.

The parcel of privately-owned land (1,165 acres) contiguous to the base of Sandy Butte and in single ownership will assist in the orderly and efficient development of facilities needed in support of skiing.

Alternative IV is of sufficient size to provide for a major destination ski resort in the State of Washington.

The National Forest System lands studied can be developed in an environmental acceptable manner.

Ski development will provide added employment. Methow Valley unemployment is consistently higher than State and County average.

The Governor of Washington State has expressed support for development of a destination ski resort at Sandy Butte. The Okanogan Board of County Commissioners favors Alternative IV.

Okanogan County government had undertaken numerous measures to prepare for development of a major recreation resort in the Methow Valley. This includes the development of a joint land use planning agreement with the Okanogan National Forest; on-site review of existing ski developments in Colorado and Whistler, B.C.; establishment of a comprehensive zoning plan for the Methow Valley; hiring of a zoning inspector to emphasize compliance in the Methow Valley; conduct of analogous case studies of other developments; conduct of state-funded studies and requests for several additional studies; participation in public/agency consensus meetings in the Methow Valley relating to growth and change; and other related activities.

Okanogan County has adopted measures recommended in the *Comprehensive Sewer Plan* to protect water quality in development of wastewater treatment and facilities in the Mazama/Early Winters Study Area. These recommendations are being implemented.

An application to develop an 8,000 SAOT ski resort at this site has been received by the Forest Service.

A majority of respondents to the DEIS from outside Okanogan County (and total) favored development of a destination ski area. The majority of respondents from Okanogan County favored no development. The Washington State Governor has stated a majority of Washington residents favor a destination ski development.



Some adverse environmental effects will occur from the development of private land with any of the alternatives, including Alternative I (No Action). No major adverse effects will result directly from the Federal action. The secondary effect included: degradation of existing air quality; degradation of existing water quality; reduction of mule deer winter range; and need for increased funding to provide necessary public services. These effects generaly [*sic*] increase with each successive alternative. Practical measures to reduce the adverse impacts have been, or are in the process of being, implemented by Okanogan County.

Based on concerns expressed as input to the Draft Environmental Impact Statement, and requests by the Okanogan Board of County Commissoners, I am directing the Forest Supervisor of the Okanogan National Forest to take the following actions in implementing this decision:

1. Require all prospective permittees to submit financial information on their ability to construct and operate ski facilities over the period of the permit.
2. Forest Service review of proposed master plans for ski development will include involvement by citizens of the Methow Valley.
3. Identify opportunities to mitigate loss of key mule deer winter range on private lands through future management of the Okanogan National Forest. Display these opportunities, and consequences, in the Land Management Plan and Environmental Impact Statement currently in preparation. The Final Environmental Impact Statement is scheduled for completion in September, 1986.
4. Require the permittee to provide for housing needed by employees. These housing needs shall

be addressed and reviewed when application is made to Okanogan County for construction of planned unit developments.

5. Maintain close cooperation and consultation with the government of Okanogan County. The Board of County Commisioners has expressed a need for certain activities to occur prior to and/or during development. These are displayed in Appendix L of the Final Environmental Impact Statement, and also listed herein. The Forest Supervisor should be generally satisfied, based on the continuing consultation and County assurance, that the intent of the conditions is being met in a reasonable manner and timeframe. Conditions include:

   A. Initiation of an effort that will result in the eventual adoption of an air quality management program designed to effectively minimize deterioration of ambient air quality from pollutants, particularly wood smoke as a result of population growth.

      The effort will be undertaken to achieve the following objectives:

      1) Provide additional data analysis and develop more sophisticated modeling for the Methow Valley.
      2) Establish planning goals for air quality in the Methow Valley through citizen involvement.
      3) Identify preferred measures and strategy needed to minimize deterioration of air quality.
      4) Identify administrative and funding structures necessary to implement the preferred management strategy.



   B. Participation in the development of a multiagency agreement for management of the Methow Valley mule deer population. Parties to the agreement should include as a minimum the Okanogan National Forest Supervisor, the Washington State Department of Game, and the government of Okanogan County. The purpose of the agreement will be to develop actions to minimize the effects of development on the Methow Valley mule deer population. The agreement shall include at least the following elements:

      1) Citizen involvement in developing goals for management of the Methow Valley deer herds.
      2) Continued refinement of information base needed to manage herds effectively.
      3) Identification of specific management strategies for herd management.
      4) Identification of funding mechanisms and sources to assure management strategies will be met.

   C. Development and implementation of a dog control ordinance to protect critical mule deer migratory routes, fawning areas and wintering areas.

   D. Development and institution of protective zoning of critical mule deer migratory routes, fawning areas and wintering areas identified by the Washington State Department of Game.

   E. Adoption of changes to current land use codes (zoning, platting, SEPA, Shorelines

Management, etc.) bringing the codes into conformance with state enabling legislation.

F. Enactment of an ordinance in accordance with Chapter 36.38,010 Revised Code of Washington (RCW) which places an admission tax of five percent on lift ticket sales. Alternatively, the government of Okanogan County may negotiate an agreement with the permittee whereby an amount not to exceed two and one-half percent is donated to a foundation established for the purpose of addressing community goals and needs and an additional two and one-half percent is enacted by ordinance in accordance with the aforementioned RCW.

G. During the review of plans for, or related to, ski facilities and base area development, an agreement shall be reached between the developer and the government of Okanogan County for the purpose of reimbursing Okanogan County agencies for current and projected costs relating to the examination of applications, plans and the conduct of public hearings up to and including the time of final action by the Okanogan County Board of Commissioners.

This decision will be implemented no sooner than 30 days after the notice of filing the Final Environmental Impact Statement appears in the Federal Register.



This decision is subject to administrative appeal in accordance with the provisions of 36 CFR 211.18.

Jeff M. Sirmon — July 5, 1984

JEFF M. SIRMON
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Date

**APPENDIX F**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

No. 86-4108
D.C. No. 85-2124-DA

METHOW VALLEY CITIZENS COUNCIL, ET AL.,
PLAINTIFFS-APPELLANTS

*v.*

REGIONAL FORESTER, ETC., ET AL., DEFENDANTS-APPELLEES.

---

FEB 10 1988

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APPEAL from the United States District Court for the District of OREGON (Portland).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of OREGON (Portland) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

Filed and entered Dec. 1, 1987



**APPENDIX G**

**REGULATIONS INVOLVED**

**I.**

The Council on Environmental Quality's present regulation governing incomplete or unavailable information provides in pertinent part (40 C.F.R. 1502.22):

**Incomplete or unavailable information**

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement: (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environ-

ment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

* * * * *

II.

The Council on Environmental Quality's rescinded regulation governing incomplete or unavailable information (the "worst case" regulation) provided in pertinent part (40 C.F.R. 1502.22 (1985)):

**Incomplete or unavailable information**

When an agency is evaluating significant adverse effects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.

(a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If (1) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important to the decision



and the means to obtain it are not known (e.g., the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence.

III.

The Forest Service's regulations governing special use permits provide in pertinent part (36 C.F.R. 251.54, 251.56):

**§ 251.54 Special use applications.**

* * * * *

(e) **Application content.** As a minimum, applications shall include the information contained in paragraphs (e)(1) through (5) of this section.

* * * * *

(4) **Environmental protection plan.** The applicant's proposed measures and plans for the protection and rehabilitation of the environment during construction, operation, maintenance, and termination of the project shall be required.

* * * * *

**§ 251.56 Terms and conditions**

(a) **General.** Each special use authorization shall contain: (1) Terms and conditions which will (i) carry out the purposes of applicable statutes and rules and regulations issued thereunder; (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and othewise [*sic*] protect the environment;

(iii) require compliance with applicable air and water quality standards established by or pursuant to applicable Federal or state law; and (iv) require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance if those standards are more stringent than applicable Federal standards; and (2) such terms and conditions as the authorized officer deems necessary to (i) protect Federal property and economic interests; (ii) manage efficiently the lands subject to the use or adjacent thereto; (iii) protect other lawful users of the lands adjacent to or occupied by such use; (iv) protect lives and property; (v) protect the interests of individuals living in the general area of the use who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (vi) require siting to cause least damage to the environment, taking into consideration feasibility and other relevant factors; and (vii) otherwise protect the public interest.

• • • • •

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# OPPOSITION

# BRIEF

Supreme Court, U.S.
FILED
MAY 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1703

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

F. DALE ROBERTSON,
CHIEF OF THE FOREST SERVICE, ET AL.,
*Petitioners,*

*v.*

METHOW VALLEY CITIZENS COUNCIL, ET AL.,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF FOR RESPONDENT METHOW RECREATION, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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No. 87-1704

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F. DALE ROBERTSON,
CHIEF OF THE FOREST SERVICE, ET AL.,
*Petitioners,*

*v.*

METHOW VALLEY CITIZENS COUNCIL, ET AL.,
*Respondents.*

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

## BRIEF FOR RESPONDENT METHOW RECREATION, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondent Methow Recreation, Inc. (MRI)[1] supports the position of the Solicitor General and urges this Court to grant the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

---

[1] MRI's 1978 application to the Forest Service for a special use permit to develop a major destination ski area on Sandy Butte in the Okanogan National Forest triggered preparation of the *Early Winters Study*. (For the Court's convenience, the Solicitor General has lodged a copy of the *Early Winters Study* with the Clerk of the Court.) MRI is a Washington corporation. It does not have any subsidiaries, but is affiliated with EWR, Inc., a Delaware corporation.

## STATEMENT OF THE CASE

MRI adopts the statement of the Solicitor General set forth in the petition for a writ of certiorari (hereinafter cited as "Petition").

## REASONS FOR GRANTING THE PETITION

MRI concurs with the Solicitor General's reasons for granting the petition. The court of appeals' decision indeed conflicts with the decisions of this Court interpreting the requirements of the National Environmental Policy Act, 42 U.S.C. 4321 *et seq*. MRI submits, in addition, that the court has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of review.[2] The court of appeals' cavalier disregard of the Forest Service's decision-making process threatens not

[2] The court of appeals, for example, either ignores or overturns virtually every finding of the district court without a single citation to the administrative or trial record (Petition App., 1a-19a).



only federal agency operations, but also private participation in federal resource management activities.[3]

In addition to the reasons stated by the Solicitor General, the court of appeals' refusal to acknowledge the nature of the impacts projected to occur as a result of the proposed ski area development represents a significant expansion of

[3] From MRI's perspective, a prime example of the court of appeals' disregard of private interests, as well as the agency's authority, is its discussion of the adequacy of the alternatives in the *Early Winters Study*. Consequently, MRI disagrees with the Solicitor General that this issue is less significant than the mitigation and worst case issues presented for review (Petition, 14 n.13). As the Solicitor General correctly states, the court of appeals appears to agree that the reasonableness of the alternatives depends essentially upon the scope of the proposed action as defined by the agency (Petition App., 9a). The *Early Winters Study* stated that its purpose was to provide the Forest Service with the information required to evaluate whether to issue a special use permit for downhill skiing on Sandy Butte. *Early Winters Study* iii, xvi, 1, D-5. The district court likewise found this to be the scope of the proposed action (Petition App., 36a). The court of appeals, without explanation, redefines the proposal in the broadest possible terms — to "provide a 'winter sports opportunity'" (Petition App., 9a), thereby converting MRI's application to develop a specific project at a specific site into a programmatic inquiry into the recreational opportunities available on forest service lands. The court's disregard of the agency's determination of the scope of the proposed action is in direct conflict with the holdings of this Court. *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519, 551 (1978); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 399-402 (1976); *see also City of Angoon* v. *Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986).

MRI also disagrees with the Solicitor General's view that correcting the alternatives analysis in accordance with the court's decision will not require substantial time and resources. To the contrary, an environmental impact analysis of the expansion of existing ski areas, which the district court found not to be reasonable alternatives (Petition App., 37a), is a purely speculative exercise, *Kleppe*, 427 U.S. at 401-02, that is bound to cause additional delay and further litigation.

the rule of reason which a reviewing court applies to determine the adequacy of an EIS. *Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974).

The Forest Service decision in this case authorized the use of forest service lands on Sandy Butte for skiing; it did not approve a specific development plan, nor did it provide any authority for development on non-forest service lands. *Early Winters Study* 1. No major adverse effects would result directly from the development of the ski area (Petition App., 67a).[4] The potential impacts to the mule deer herd, to air quality, indeed all of the potentially significant effects, are related to growth that is expected to occur with or without the ski area over the next 10-20 years. True, these impacts would be accelerated if development occurs, but they are nevertheless only indirectly related to the project. *See* 40 C.F.R. §1508.8(b).

The distinction between primary and secondary effects has a direct bearing on the adequacy of the discussion of impacts and mitigation measures. *See Enos* v. *Marsh*, 769 F.2d 1363, 1373 (9th Cir. 1985) (secondary effects inherently more speculative and, consequently, more difficult to assess); *Stop H-3 Association* v. *Dole*, 740 F.2d 1442, 1461-62 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985). The district court, citing *Enos*, considered the uncertainty involved in assessing secondary effects in applying the rule of reason to its determination of the adequacy of the *Early Winters Study* (Petition App., 38a). The court of appeals finds error in the district court's consideration of the indirect nature of the effects without even acknowledging the precedent established in *Enos*, or the fact that *Enos* expressly distinguishes *City of Davis* v. *Coleman*, 521 F.2d 661 (9th Cir. 1975) and *Coalition for Canyon Preservation* v. *Bowers*, 632 F.2d 774 (9th Cir. 1980), the two cases upon

[4] This conclusion has never been challenged (Petition App., 38a).



which the court relies almost exclusively (Petition App., 11a-12a).[5]

The court of appeals compounds its error by suggesting that a worst case analysis may have been necessary because of the insufficiency of the available information. But any uncertainty in assessing the potential effects of the proposed action, at least according to *Enos* and the district court, was not due to the insufficiency of available information, but rather to the speculative nature of indirect impact analysis (Petition App., 39a-40a).

The indirect nature of the significant effects of the Early Winters project also bears on the adequacy of the mitigation program prescribed by the Forest Service. Because the potentially significant adverse effects are related to growth and development on non-forest service lands, the Forest Service required local and state governmental agencies with jurisdiction in the area to study and implement measures to mitigate the impacts of anticipated growth prior to the commencement of construction (Petition App., 68a-70a).[6]

[5] The court of appeals' discussion of this issue implies that the *Early Winters Study* neglects to discuss the secondary effects of the proposal (Petition App., 11a-12a). This notion is unfounded. The EIS discusses in detail the significant adverse effects of the project, virtually all of which are secondary in nature. *Early Winters Study* 65-71, 73-76, 79-101, 121-135. The district court cited the uncertainty and speculation involved in predicting secondary effects as one of the considerations involved in determining the adequacy of an EIS under the rule of reason, not to excuse the omission of a discussion of significant effects (Petition App., 38a).

[6] By the time this case proceeded to trial, the Forest Service had entered into agreements with federal, state and local agencies to develop mitigation programs. These agreements in turn led the responsible agencies to undertake extensive studies of air quality and mule deer issues, for example, so that mitigation measures could be implemented prior to the time the anticipated secondary growth occurred (Petition App., 41a-42a, 45a-46a).

The district court concluded that the Forest Service's actions were evidence of informed decision-making and responsive to the potential effects of the project, citing *Sierra Club* v. *Clark*, 774 F.2d 1406 (9th Cir. 1985) (Petition App., 42a). Again, however, the court of appeals ignored this and other precedent which hold that where the ability to control secondary effects is outside the jurisdiction of the federal agency, it is sufficient and reasonable for the EIS to identify mitigation measures for consideration by those local and state agencies with authority in the area. *See Preservation Coalition, Inc.* v. *Pierce*, 667 F.2d 851, 860 n.6 (9th Cir. 1982) (mitigation measures developed in close cooperation with local government with jurisdiction was a significant factor in determining EIS efficacy); *City and County of San Francisco* v. *United States*, 615 F.2d 498, 501 (9th Cir. 1980) (court approved practice of relying upon cooperative efforts with city to relieve significant adverse traffic impacts).

The court of appeals' decision would impose significant and unwarranted obligations on federal agencies and would substantially affect the ability of the private sector to participate in federal resource management activities. To require federal agencies to engage in a worst case analysis of impacts or to develop and model the potential effectiveness of measures to mitigate effects that are only indirectly related to the federal action and may not occur for 10-20 years would cause endless delay in agency decision-making. The purpose of NEPA is to assist agencies in assessing the environmental effects of proposed actions. *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983). It is not intended to bring resource management to a grinding halt as the agency searches for answers to the unending inquiries posed by the environmental sciences. *See National Helium Corp.* v. *Morton*,



486 F.2d 995, 1004 (10th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

## CONCLUSION

MRI joins the Solicitor General in urging this Court to review the court of appeals' decision in this case. The court's departure from long-standing NEPA decisions by this Court and its failure to adhere to generally accepted judicial practices will have a chilling effect not only on federal agencies, but also on private businesses that participate with those agencies in federal resource management activities.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 6, 1988

# OPPOSITION

# BRIEF

(3)

Supreme Court, U.S.
FILED
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CLERK

No. 87-1703

In The
# Supreme Court of the United States
October Term, 1987

F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE, ET AL.,

*Petitioners,*

v.

METHOW VALLEY CITIZENS COUNCIL, ET AL.,

*Respondents.*

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act requires federal agencies to analyze potential mitigation measures when the agency expressly relies upon those measures to conclude that a proposal's environmental impacts will be acceptable.

2. Whether the Early Winters special use permit was issued in violation of Forest Service regulations requiring the permit to include conditions to minimize environmental impacts.

## PARTIES TO THE PROCEEDING

Respondents accept petitioners' description of the parties to the proceeding. Methow Valley Citizens Council, Washington Environmental Council, and Sierra Club are all not-for-profit corporations. None of the respondents has any parent companies, subsidiaries, or affiliates. This statement is provided pursuant to Supreme Court Rule 28.1.



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No. 87-1703

In The
# Supreme Court of the United States
October Term, 1987

F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE, ET AL.,

*Petitioners,*

v.

METHOW VALLEY CITIZENS COUNCIL, ET AL.,

*Respondents.*

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents, Methow Valley Citizens Council, Washington Environmental Council, and Sierra Club, respectfully request that this Court deny the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Regulations of the Council on Environmental Quality, not reproduced in the petitioners' appendix, are reproduced in pertinent part in the appendix to this brief.

## STATEMENT OF THE CASE

With the following additions and corrections, respondents accept petitioners' statement of the case, as supplemented by the facts in the opinion of the Court of Appeals:

1. Without effective mitigation, the Early Winters four seasons resort project[1] would result in extreme environmental degradation of the sparsely populated, unspoiled Methow Valley. Air pollution (generated principally by automobiles and wood stoves) would more than double and would exceed state air pollution standards. Early Winters Study at 67. The State's largest migratory deer herd would lose 15 to 50 percent of its critical winter range. *Id.* at 76.[2] Other resources would suffer

[1] The proposal before the Forest Service contemplated much more than construction of ski lifts on Forest Service land. The ski facilities on Forest Service land would be part of a four season resort covering more than 1,000 acres on adjacent private lands. A golf course, horse stables, youth camp, and other facilities were contemplated. Early Winters Alpine Winter Sports Study Final Environmental Impact Statement ("Early Winters Study" or "EIS") at 13-14. (A copy of the Early Winters Study has been lodged with the Clerk of the Court by the petitioners.)

[2] Because the deer herd's population is directly related to the amount of winter range available, an equally significant loss of deer would also be expected. Trial Transcript (TR) at 315-16.



similar damage. *See id.* at 69 ("significant groundwater deterioration could result from the continued use of conventional wastewater disposal techniques"); *id.* at 78 ("without implementing appropriate mitigation measures, development has the capability of causing severe impacts to the fisheries resources").

2. The Early Winters Study frequently cited implementation of mitigation measures as the basis for its conclusion that the otherwise significant impacts would be greatly reduced, if not eliminated. *See, e.g.*, Early Winters Study at 67 ("[t]he numerous mitigation measures discussed at the end of this section (Air Quality) will greatly reduce the impacts presented by the [air quality forecast] model"); *id.* at 77 ("[l]isted below are specific mitigation measures which will alleviate adverse effects on wildlife"); *id.* at 76 ("[f]awning would not be adversely affected with implementation of mitigation measures'); *id.* at 78 ("[t]he mitigation listed in Chapter II . . . will reduce the risk of negative impacts to fisheries").

3. Consideration of the benefits afforded by mitigation measures listed in the Early Winters Study was an integral part of the Study's assessment of environmental impacts. Indeed, in the heart of the Study, where the proposal was compared with alternative courses of action, the document assumed and relied on the benefits of mitigation measures for purposes of the comparison. *Id.* at 18. The Regional Forester's Record of Decision approved the project on the assumption that mitigation would occur. Record of Decision, 4a-6a (Petitioners' App. 67a-70a).

4. The Study did not assess the cost, effectiveness, or enforceability of the measures which it assumed would mitigate adverse impacts. Nor did the Study consider the likelihood of their acceptance or implementation by third parties. For instance, the Study recognized that development could "reduce or eliminate the existing annual production of fish in lower Cedar and Early Winters creek." Study at 78. But as mitigation for this impact, the EIS lists—without any discussion or detail—"best management practices." *Id.* at 78 (cross-referencing *id.* at 16). The Study did no better with its discussion of measures for deer or air. *Id.* at 68-69 (air); 76-78 (deer).

5. The memoranda of understanding the Forest Service entered into with various federal, state, and local agencies (which petitioners assert constitute mitigation measures) are not binding on any of the agencies, including the Forest Service. The memoranda were developed to coordinate possible efforts to mitigate anticipated damage to the deer herd and air quality. Supplemental Excerpts of Record ("SER") 30-39, 45-49. Each memorandum provides that the signators may withdraw from the understanding at any time for any reason on 30 days notice. SER 34, 46. Also, each agency explicitly refuses in the memoranda to make any financial commitment to implement mitigation measures. SER 33, 46. Referring to the air quality memorandum, the court of appeals concluded "the [memorandum] offers no assurance whatsoever that the vague mitigation objectives it features—performance of almost all of which would be the responsibility of third parties to the permit process—would ever in fact be achieved or even that effective measures would ever be designed, let alone implemented, if the Early



Winters development were to proceed." Petitioners' App. 18a-19a.

6. Subsequent environmental review contemplated by the Forest Service's "two-phase permitting process"[3] would develop mitigation measures only for impacts resulting directly from on-site construction activities. The Forest Service does not contemplate additional environmental review or development of mitigation measures for the more extensive impacts resulting from off-site development.[4] For instance, nowhere did the draft permit (or the permit subsequently issued) require further analysis or consideration of measures to mitigate offsite impacts.[5]

---

[3] The two-phase permitting process described by the petitioners actually has three phases. First, the Forest Service approves the project concept. (That approval on July 5, 1984 gave rise to this litigation.) Second, the Forest Service issues a term permit and a special use permit to a qualified developer. (The permits were issued to MRI on July 21, 1986—shortly after oral argument before the court of appeals. No additional environmental review was performed.) Third, the Forest Service approves the master development plan which approval allows construction to commence. (A master development plan has not been submitted or approved for this project.)

[4] In the Early Winters Study, the Forest Service identified the severe damage to air quality, the deer herd, and other environmental resources that would result not from construction of the ski resort itself, but from the extensive development throughout the Methow Valley that would follow in the wake of the four seasons ski resort. The impacts from on-site construction were labelled direct impacts. The impacts from off-site development were labelled indirect impacts.

[5] In contrast, the Forest Service did envision developing detailed mitigation measures for the direct, on-site impacts prior to allowing construction to proceed. The sample permit append-

(Continued on following page)

The Regional Forester passed up his opportunity to require the development of mitigation measures prior to construction of the resort when he issued the Record of Decision. The Okanogan County Board of Commissioners had identified mitigation measures that the County could implement, and requested that the Regional Forester require in the Record of Decision that the mitigation measures be implemented prior to construction. Early Winters Study, App. L-2. But the Regional Forester required only that "the intent of the [mitigation] conditions [be] met in a reasonable manner and time frame." Record of Decision, 4a (Petitioners' App. 68a).

The Regional Forester did state that "opportunities to mitigate loss of key mule deer winter range on private lands" would be identified in separate planning documents for the entire Okanogan National Forest. Record of Decision, 4a (Petitioners' App. 67a). But there was no requirement that that study be completed prior to issuing the contruction permit.[6]

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(Continued from previous page)

ed to the EIS included the procedures for developing measures to mitigate on-site impacts prior to the commencement of construction. Early Winters Study, Appendix I, ¶ 49 (requiring submission of planting plans to reasonably restore areas disturbed during construction); ¶ 53 (prohibiting discharge of waste in concentrations which will result in substantial harm to the environment); ¶ 56 (requiring submission of plan to ensure slope stabilization and prevent soil loss throughout the permitted area). Similar provisions regarding off-site impacts are conspicuous by their absence.

[6] The Record of Decision indicated that the identification of mule deer mitigation measures could occur in the Land Management Plan and Final Environmental Impact Statement for the entire Okanogan National Forest. At the time of the Record of Decision in July, 1984, the Regional Forester anticipated completion of this other study by September, 1986. However, as of this date, this forest-wide study still has not been completed.



7. Even if the Forest Service were to consider in detail the likely impact of the listed mitigation measures at a later stage of the permit process, the Forest Service (and the developer and third parties) already would have committed significant resources to the planning and preliminary development of the project. The Forest Service and developer would have invested heavily in developing and reviewing a master development plan and site specific plans for items such as buildings, service areas, roads, ski lifts, other structures, and landscaping. *See*, Draft Special Use Permit, Early Winters Study, App. I ¶¶ 35, 46, 47, 49, 50, 51, 52, 56).

Similarly, third parties, most notably Okanogan County, would have committed significant amounts of their resources in anticipation of the project. For example, the Okanogan County Commissioners contemplated developing new regulatory ordinances and new revenue sources. *See* Early Winters Study, App. L.

Numerous private property owners throughout the Methow Valley also could be expected to accelerate their commitment of significant resources in the vicinity of the promised resort. (By 1984, speculation in the area had driven prices from $3,000 to $4,000 per acre to $10,000 per acre. Additional increases were forecast. Early Winters Study at 41, 97.)

8. The Forest Service did not contend that it could not have assessed the likely impact of the listed mitigation measures prior to issuing its Record of Decision. For example, *after* making the decision challenged in this case, the Forest Service commenced a comprehensive study of the mule deer herd. This study was designed to assess the

proposal's impacts to the deer herd and to gather information useful in designing measures to mitigate those impacts. Excerpts of Record (ER) 73-76, 80-81. The Forest Service game biologist who prepared the EIS analysis of the deer herd admitted at trial that there was no reason the deer study could not have been commenced and completed prior to preparation of the EIS and prior to the Regional Forester's decision to proceed with this proposal. TR 412.

## REASONS FOR DENYING THE PETITION

Petitioners seek Supreme Court review of the court of appeals' decision by challenging peripheral statements that are not essential to the court's holdings and were not raised or briefed below. Petitioners have challenged only one significant holding of the court of appeals: That the Early Winters Study's discussion of mitigation measures was inadequate as a matter of law. But the court of appeals correctly held that the listing of mitigation measures in the Study fell far short of NEPA's[7] requirement for a "detailed statement" analyzing the environmental consequences. The petition fails to demonstrate that the court of appeals' decision conflicts with decisions of this Court or other federal courts of appeals, or otherwise merits this Court's consideration. *See* Rules of the Supreme Court of the United States, 17.1.

[7] The National Environmental Policy Act of 1969, 42 U.S.C. § 4331 *et seq.* The "detailed statement" requirement is found at 42 U.S.C. § 4332(2)(C).



First, petitioners challenge the court of appeals' statement that NEPA requires federal agencies to mitigate adverse environmental impacts, characterizing the court's statement as imposing a legally enforceable substantive duty to mitigate adverse impacts. Petition at 14-15. However, the court's holding regarding mitigation measures was that the Forest Service had violated NEPA's *procedural* requirement to analyze mitigation measures in an impact statement. Petitioners' App. 17a. Respondents never have asserted that NEPA imposes a substantive duty to mitigate; the issue was not briefed or argued below; and the court of appeals' holding does not rest on such a duty.

Similarly, petitioners challenge the court's statement that a worst case analysis must be prepared if an agency is unable to obtain information essential to a reasoned decision. But the court's holding—unchallenged by petitioners—was that the Study's discussions of impacts to the deer herd and to air quality were inadequate. Petitioners' App. 12a-14a (deer); 15a-16a (air). The court's observation regarding the need for a worst case analysis as to impacts on the deer herd pertained only to what might be required if critical information gaps remain when the EIS is revised. *Id.* at 14a. The worst case analysis issue was not raised before the court of appeals, and it may never emerge on remand.

Petitioners' only challenge to a central holding of the case is their disagreement with the court's interpretation of NEPA's procedural directive that an agency must analyze mitigation measures in an EIS. But in a case where the agency relied upon the effectiveness of listed

mitigation measures to conclude that project impacts would be limited, if not eliminated, the court properly required the agency to take a "hard look" at the supposed effectiveness of the mitigation measures. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983). NEPA's express requirement to prepare a "detailed statement," the implementing regulations, and this Court's decisions demand no less. Petitioners do not cite a single case which holds that an analysis of mitigation is *not* required.

Finally, petitioners quibble with the court's interpretation of Forest Service regulations that require special use permits to impose conditions to minimize environmental impacts. Yet petitioners concede that for years the agency has "operated under guidelines . . . that directed the agency to minimize harm to resources." Petition at 22. The wording of the regulation clearly is mandatory, using the words of command "shall" and "will." 36 C.F.R. 251.56(a). The court of appeals correctly decided the regulation required the imposition of mitigation measures. Petitioners' App. 51, n.3. Petitioners' argument is simply unfounded.

### 1. The Court of Appeals Did Not Hold That the Forest Service Violated a Substantive Requirement to Impose Mitigation Measures.

The petition should be denied because the issue of NEPA's substantive requirements was not raised or decided in the courts below. Petitioners mischaracterize the court of appeals' statement that "NEPA requires that 'action be taken to mitigate the adverse effects of major federal action,'" Petitioners' App. 17a (citation omitted), asserting that the statement is recognition of a judicially



enforceable, substantive duty under NEPA to mitigate environmental harm. Petition at 14-15. But even if this characterization were accurate,[8] the issue of whether NEPA establishes substantive duties was not raised or addressed by the parties below. The petition should be denied for this reason alone. *City of Springfield v. Kibbe*, — U.S. —, 107 S.Ct. 1114, *rehearing denied* 107 S.Ct. 1966 (1987); *Equal Opportunity Employment Commission v. Federal Labor Relations Board*, 476 U.S. —, 106 S.Ct. 1678 (1986); *Delta Air Lines, Inc. v. Aigist*, 450 U.S. 346, 362 (1981) (Supreme Court ordinarily will not decide questions not raised or briefed in the lower courts).

The petition as to NEPA's substantive requirements should be denied also because the court's statement was dictum, unnecessary to its holding that the agency had violated NEPA's procedural requirements. The court did not invalidate the agency action on the basis that the Forest Service had violated a substantive duty created by NEPA, but because the agency had violated NEPA's procedural duty. Petitioners' App. 19a. Consistent with this Court's direction that a reviewing court should not "interject itself within the area of discretion of the executive as to the choice of the action to be taken," *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1986) (citation omitted), the court of appeals did not dictate to the Forest Service any particular substantive result. The court did

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[8] More likely, the court's reference to NEPA's mitigation requirement was a reference to NEPA's very strong substantive goals. *See* 42 U.S.C. § 4331(b) (federal agencies "to use all practicable means" to meet six goals of environmental excellence); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978) (NEPA establishes "significant substantive goals for the Nation").

not enumerate the components of a mitigation plan, nor did it even require the Forest Service to adopt a mitigation plan pursuant to NEPA. The court carefully limited its holding so that the need for mitigation was left appropriately to the agency.

The court's true holding was that the impact statement's mitigation analysis was inadequate. Petitioners' App. 19a. That holding is premised on NEPA's procedural requirement, entirely distinct from the existence or non-existence of an enforceable substantive duty. *See, e.g., Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 558 (1978) (distinguishing NEPA's substantive goals from its procedural mandate). This court should not grant review to consider the correctness of dictim.[9]

### 2. This is Not the Proper Case to Address the Court's Peripheral Finding That a "Worst Case Analysis" is Required Where Essential Information Cannot Reasonably Be Obtained.

The court of appeals held that "[t]he EIS's cursory discussion of the impacts to the mule deer herd, based on

[9] The similar sounding, but distinct issue of whether the court had authority to find the agency action arbitrary and capricious for failure to comply with its own special use permit regulation, 36 C.F.R. 251.56, was not raised in the petition. The court's authority to find agency action arbitrary and capricious is established in the Administrative Procedures Act, 5 U.S.C. § 706. This Court and others have recognized that a reviewing court's authority to strike down agency action as arbitrary and capricious in an environmental case is independent of NEPA's requirements. *Baltimore Gas and Electric Co. v. NRDC,* 462 U.S. 87, 97-98 (1983) (role of the courts is to ensure that agency "has adequately considered and disclosed the environmental impacts of its actions *and* that its decision is not arbitrary or capricious") (emphasis supplied); *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 535, n.14 (1978); *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415-17 (1971).



incomplete information, is inadequate as a matter of law." Petitioners' App. 14a. Petitioners do not challenge this holding. The court then stated (for the future guidance of the Forest Service) that if a new mule deer study in progress at the time of the court's decision "still provides incomplete information, a worst-case analysis would be required for the areas in which information is lacking." *Id.* This peripheral observation is challenged by the petitioners. But the challenge fails for three reasons.

First, the court was correct that the worst case analysis requirement applies to the Early Winters Study. The court's statement reflects both applicable case law and the regulation in effect at the time the Forest Service prepared the challenged EIS.[10] The amendment to 40 C.F.R. 1502.22(b), which deleted specific reference to the worst case analysis, did not become effective until May 27, 1986[11]—two years after the Study was published (and after the district court trial of this action). The Forest Service has not asserted—nor could it assert—that the Council on Environmental Quality (CEQ) meant the regulation to have retroactive effect.

Second, the petitioners seek to raise an issue which was not briefed or argued below. This Court ordinarily will not decide questions not raised or briefed in the lower courts. *City of Springfield v. Kibbe, supra; Equal Opportunity Employment Commission v. Federal Labor Relations Board, supra; Delta Air Lines, Inc. v. Aigist, supra.*

The focus of this litigation has been on subpart (a) of 40 C.F.R. 1502.22, not subpart (b).[12] Subpart (a) re-

[10] *See* 40 C.F.R. 1502.22(b), prior to amendment in 1986.

[11] 40 C.F.R. 1502.22(c) (1987).

[12] Subpart (a) was not amended substantively in 1986.

quires agencies to identify and obtain missing information that is essential to a reasoned choice, if the information can be obtained feasibly. In contrast, subpart (b) applies where the missing information cannot be obtained, or only at exorbitant expense. Only in the latter case was a worst case analysis required.

The question presented to the court of appeals was whether 40 C.F.R. 1502.22(a) dictated that the results of the on-going deer study be included in the Early Winters Study. Brief of Appellants at 34. Petitioners argued below that the Early Winters Study was adequate without the information from the on-going deer study, and that, in any event, the on-going study could retroactively cure the deficiencies in the Early Winters Study.[13] None of the parties addressed the worst case issue, that is, what would be required if the on-going study provided insufficient information, too. There is not a single citation in the Ninth Circuit briefs to either the former or present version of 40 C.F.R. 1502.22(b). Yet petitioners now seek review of the proper interpretation of that subsection.

Third, and in a related vein, this Court should not grant the petition because the worst case analysis issue is not ripe

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[13] The court of appeals rejected this latter argument, too, stating:

> The Forest Service is presently preparing a detailed and comprehensive study of the mule deer. However, just as the subsequent preparation of mitigation measures will not cure a deficient EIS, . . . neither will a subsequent study providing information essential to assessment of the environmental impacts of a proposed action and its alternatives.

Petitioners' App. 13a. Petitioners are not challenging this part of the court's holding.



for review. The results of the new comprehensive deer study have not yet been assessed. No one has determined whether it provides sufficient information for a reasoned choice. There is nothing in the record to trigger the applicability of 40 C.F.R. 1502.22(b)—no matter which way it is interpreted. This Court should not grant the petition to consider an issue which has not yet materialized and for which no record exists.

In sum, this is not the proper case in which to address the issue of whether the 1986 amendment to subpart (b) correctly interprets NEPA and existing case law. The amended regulation does not apply to the Early Winters Study. Moreover, the question of worst case analysis was not raised in the lower court and will not even be reached unless the current comprehensive mule deer study fails to provide critical information. Interpretation of amended subpart (b) should await a case in which (1) the EIS was prepared after the amended regulation became effective; (2) an agency's failure to prepare a worst case analysis has been challenged and the failure is central to the lower court's holding; and (3) the issue is briefed in the lower court.[14]

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[14] If this Court grants a writ of certiorari that includes the "worst case analysis" issue, respondents will show that judicial interpretations of NEPA provide an independent source for the worst case analysis requirement. This argument has already been raised by respondent Oregon Natural Resources Council in its brief in opposition to Petition for Writ of Certiorari in *Oregon Natural Resources Council v. Marsh*, 832 F.2d 1489 (9th Cir. 1987), *petition for cert. filed sub. nom. Marsh v. Oregon Natural Resources Council*, No. 87-1704.

### 3. The Court of Appeals Properly Held That the EIS's Discussion of Mitigation Measures Was Inadequate.

The court of appeals' conclusion that NEPA requires an analysis of mitigation measures is consistent with the language of the Act, its implementing regulations, and the holdings of this Court. The requirement that an environmental impact statement be "detailed" is found in the statutory language itself. 42 U.S.C. 4332(2)(C) ("all agencies of the Federal Government shall include in every recommendation or report for . . . major Federal action . . ., a detailed statement on . . . the environmental impact of the proposed action [and] any adverse environmental effects which cannot be avoided . . ."). 

The purpose of the "detailed statement" is to inform the decisionmaker as to the proposal's probable impacts and to assure the public that the agency had considered those probable impacts. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983). These purposes would be thwarted if an agency could conclude that a project's impacts would be minor due to mitigation measures based only upon a cursory listing of potential mitigation measures. Consequently, the regulations of the Council on Environmental Quality specify that the discussion of mitigation measures is to be interwoven in the detailed discussion of the project's environmental impacts and in the detailed discussion comparing the proposal with alternatives.

> [The environmental consequences] section forms the scientific and analytical basis for comparison under § 1502.14. . . . It shall include discussions of:
>
> • • •



> (h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14 (f)).

40 C.F.R. 1502.16.

> [The alternatives]section is the heart of the environmental impact statement. . . . [I]t should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by decisionmaker and the public. In this section agencies shall:
>
> • • •
>
> (f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

40 C.F.R. 1502.14 (f). *See also* 40 C.F.R. 1505.2(c) (record of decision shall state "whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not"). Providing yet additional emphasis to the requirement to analyze—not merely list—mitigation measures, the Council on Environmental Quality in 1981 advised federal agencies that "to ensure that environmental effects of a proposed action are fairly assessed, the probability of the mitigation measures being implemented must also be discussed." 46 Fed. Reg. 18026, 18032 (Mar. 23, 1981).

A reviewing court must be assured "that the agency has taken a 'hard look' at the environmental consequences *before* taking a major action." *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983) (emphasis supplied). The courts must enforce the procedural requirements "imposed by . . . the plain

language of the Act." *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 548 (1978). The court of appeals applied these well-settled standards and found the Early Winters Study lacking.

Because the Forest Service relied so heavily on the list of potential but unassessed mitigation measures to conclude that the impacts of the project would be reduced, minor, or non-existent as a result of mitigation measures, the Forest Service had a duty to analyze in detail the mitigation measures it relied upon to reduce the adverse impacts to an acceptable level. Mitigation measures were listed in the Study, but a "detailed" discussion was missing. Even a brief discussion was missing. The Study merely listed possible mitigation measures with no further analysis. The impact statement did not discuss whether the mitigation measures were likely to be implemented, or, if implemented, to what extent they would be effective. In the absence of a detailed discussion of the mitigation measures, the Study simply had no basis for concluding repeatedly that the project's otherwise significant impacts would be reduced or non-existent.

Where an agency relies upon potential mitigation measures to conclude that a project's ultimate impacts are acceptable, the discussion of those mitigation measures must be detailed. The result urged by the petitioners would leave a gaping hole in NEPA's "detailed statement" requirement. *See Environmental Defense Fund v. Froehlke*, 473 F.2d 346, 351 (8th Cir. 1972) ("proposed mitigation plans go to the very heart of the question"; agency's failure to analyze costs and benefits of allowing mitigation to proceed is contrary to CEQ guidelines).



Contrary to petitioners' assertion, this case does not present the issue of whether "all environmental impact statements [must] contain detailed and demonstrably effective mitigation plans." Petition at 12. The court of appeals' decision was addressed to the facts of this case. Here, the agency assumed that the existence of mitigation measures would significantly reduce—or in some instances, eliminate—the project's admittedly substantial adverse effects. In that situation, the agency must do more than blithely list potential mitigation measures. Blind faith optimism is not consistent with NEPA's duties. *See Flint Ridge Development Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787 (1976) (NEPA's requirements "not [to] be shunted aside in the bureaucratic shuffle"); *Public Service Corp. v. United States Nuclear Regulatory Comm.*, 582 F.2d 77, 81 (1st Cir. 1978) ("insufficient to give mere lip service to [NEPA] and then proceed in blissful disregard of its requirements").

In another case, the Court could be presented with the situation where an agency has *not* relied upon mitigation measures to justify its decision. In such a case, the Court could determine whether NEPA requires a detailed discussion of mitigation measures in the absence of the agency's reliance on those measures to justify the proposed action. But this is not that case.

Contrary to the petitioners' assertion, the court of appeals' decision will have beneficial consequences for project planning. Petition at 16. The court's decision does not preclude an agency from making an initial feasibility determination until a complete mitigation plan has been developed. Rather, it assures that the agency (and

the developer and other interested third parties) do not commit substantial resources to a project until after initial feasibility determinations have been completed. *See* 40 C.F.R. 1502.2(f) (forbidding agencies from committing resources in a manner that will bias the agency's ultimate decision).

If the Regional Forester's July 5, 1984 decision to proceed with the development had gone unchallenged, the Forest Service, the developer, Okanogan County, and other private property owners in the area would have committed significant resources in anticipation of the construction of the project. *See supra* at 7. If on the eve of construction the Forest Service had determined that the mitigation measures it had merely listed in the EIS were not feasible, were too costly, or otherwise could not be relied upon, the agency's ability to deny construction approval would have been compromised substantially. *See* 46 Fed. Reg. 18026, 18028 (Mar. 23, 1981) (CEQ regulation (40 C.F.R. 1501.2 (d)) which requires early application of NEPA fosters "process which avoids later unexpected confrontations"). The time to assess the viability of mitigation measures is before significant resources are committed to a project, not afterwards. Only with such a process can the agency make its substantive decision unfettered by the pressures associated with millions of dollars of sunk costs.[15]

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[15] The importance of developing mitigation measures at the beginning of the planning process was recognized and expounded upon at length in the proceedings of a symposium published by the Forest Service a year before work began on the Early Winters Study. *See* "The Mitigation Symposium: A National

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Also contrary to the petitioners' assertion, the court's holding is not inconsistent with the "tiered" environmental review process permitted by the CEQ regulations. *See* 40 C.F.R. 1502.20. That regulation permits, in some cases, deferring some environmental review to later phases of the planning process. But the Forest Service here did not propose to defer review of the measures to mitigate off-site impacts. No further review of these matters was contemplated. *See supra* at 5-6. The optional tiering process has no applicability to this case.

The court's holding is consistent with NEPA's purpose and its unambiguous procedural requirement to prepare a "detailed statement." Petitioners do not cite a single case where a court has held that mitigation measures need *not* be analyzed in an environmental impact statement. Because petitioners have failed to demonstrate a conflict between the circuits or with any decision of this Court, and have advanced no other basis for issuing the writ, the petition should be denied.

**4. The Court of Appeals Properly Held That the Forest Service Regulation Requires Imposition of Conditions to Mitigate Environmental Impacts.**

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(Continued from previous page)

Workshop on Mitigating Losses of Fish and Wildlife Habitats," United States Forest Service, Jul. 16-20, 1979. Time and again the symposium participants emphasized the importance of integrating development of mitigation measures into the early stages of project planning. *Id.* at 4 (" 'Early Planning' is viewed by many as the key to minimizing or avoiding conflicts over development"); *id.* ("[i]nsufficient predevelopment studies . . . may . . . make it difficult, or even impossible, to implement accepted measures"); *id.* at 331 (a basic reason for failed mitigation is that "[f]ish and wildlife considerations are not incorporated early in resource development planning").

Petitioners' challenge to the court of appeals' finding that approval of the project was arbitrary and capricious is moot. Because review has not been sought of several dispositive holdings by the court of appeals, the agency has conceded that parts of its environmental impact statement will have to be rewritten.[16] The new impact statement will provide the agency with additional information to utilize in determining whether to issue a permit and, if so, what conditions to establish. Whether the mitigation conditions included in the July 5, 1984 decision were adequate is now moot because that decision will have to be remade.

Petitioners' argument fails on its merits, too. If petitioners claim that the pertinent regulations do not mandate imposition of conditions to minimize harm to the environment, they are plainly wrong. The Forest Service regulations governing the issuance of special use permits unambiguously provide:

> Each special use authorization *shall* contain: (1) Terms and Conditions which *will* . . . (ii) minimize damage to scenic and aesthetic values and fish and wildlife habitat and othewise (sic) protect the environment . . .

36 C.F.R. 251.56(a) (reprinted in Petitioners' App. 75a-76a) (emphasis supplied). There is nothing precatory about this requirement. The regulation uses two words

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[16] Petitioners do not seek review of the court of appeals' holdings that the Study discussed inadequately alternatives to the proposal, impacts to the deer herd, and impacts to air quality in the adjacent Pasayten Wilderness Area and the upper Methow Valley.



of command ("shall" and "will") and offers no discretion to the agency official issuing the permit.[17]

Petitioners argue that the requirement to impose conditions which will minimize environmental damage does not constitute a command to develop a mitigation plan. Petitioners seemingly attempt to distinguish between measures to mitigate damage and measures to minimize damage. They seem more concerned with the court of appeals' choice of words than with the substance of its decision. Petitioners admit that the Forest Service has long operated under guidelines which direct the agency to minimize harm to environmental resources. Petition at 22 and n.24. Call it a mitigation plan or a "minimization" plan, the meaning is the same.

Alternatively, petitioners take issue with the court's determination that the mitigation measures here were "so vague and undeveloped as to be wholly inadequate." Petition at 21 (quoting Court of Appeals' decision, Petitioners' App. 5a, n.3). However, the court of appeals accurately noted the absence of any substance in the conditions to mitigate off-site impacts. *See supra* at 4-5 (¶¶ 4-5). Consequently, the court correctly concluded that the agency could not approve the proposal without something more than vague, undeveloped conditions to minimize off-site impacts.

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[17] When the regulation intended to give discretion to the permitting officer, the regulation did so unambiguously. The second subsection of 36 C.F.R. 251.56(a) explicitly provides the agency officer with discretion in determining whether other conditions may be necessary. *Compare* 36 C.F.R. 251.56(a)(1) (requiring imposition of conditions "which will" minimize environmental damage) *with* 36 C.F.R. 251.56(a)(2) (authorizing imposition of conditions "as the authorized officer deems necessary" to protect other interests).

## CONCLUSION

The court of appeals' decision was compelled by the purpose and language of NEPA as interpreted by this Court and other federal courts of appeals. Petitioners have not demonstrated that any part of the court's decision is in conflict with any decision of this Court or any other federal court of appeals. The petitioners have not advanced any other justification for granting the petition. *See* Rules of the Supreme Court 17.1. Moreover, petitioners have raised issues which were not briefed below and which are not ripe for review. The petition for writ of certiorari should be denied.

Respectfully submitted,

BRICKLIN & GENDLER

DAVID A. BRICKLIN
*Attorney for Respondents*

June, 1988



## APPENDIX

40 CFR § 1502.14 and § 1502.16

§ 1502.14 *Alternatives including the proposed action.*

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

• • •

§ 1502.16 *Environmental consequences.*

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by secs. 102(2)(C) (i), (ii), (iv) and (v) of NEPA which are within the scope of the statement and as much of sec. 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrivable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.



(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

# REPLY

# BRIEF

Supreme Court, U.S.
FILED
JUN 14 1988
JOSEPH F. SPANIOL, JR.

No. 87-1703

# In the Supreme Court of the United States

OCTOBER TERM, 1987

F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE, ET AL., PETITIONERS

*v.*

METHOW VALLEY CITIZENS COUNCIL, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

CHARLES FRIED
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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| Section 251.56(a)(1)(ii) | 6 |
| Sup. Ct. R. 17.1(a) | 2 |

# In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1703

F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE, ET AL., PETITIONERS

*v.*

METHOW VALLEY CITIZENS COUNCIL, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

In our petition for a writ of certiorari, we showed that the court of appeals has interpreted the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, to impose on federal agencies major new requirements that are not supported by the statutory language and that contradict this Court's decisions interpreting the Act. We further showed that the court of appeals has misinterpreted a Forest Service regulation governing the issuance of special use permits. The NEPA issues—which are also raised in our petition for a writ of certiorari to the same court in *Marsh* v. *Oregon Natural Resources Council*, No. 87-1704—and the question of the proper interpretation of the Forest Service regulation are substantial. Respondents attempt, without success, to downplay the importance of those issues. There can be no denying that the court's decision represents a serious departure from established NEPA jurisprudence that would have broad consequences for federal projects throughout the Ninth Circuit.

1. Respondents make no attempt to defend the court of appeals' imposition of a substantive obligation on federal agencies " 'to mitigate the adverse effects of major federal actions' " (Pet. App. 17a (citation omitted)). Instead, they oppose review by arguing that the parties did not raise the issue (Br. in Op. 11) and that "the court's statement was dictum, unnecessary to its holding" (*ibid.*). Both arguments are unpersuasive.

Respondents observe that the court of appeals addressed sua sponte the question whether NEPA imposes a substantive duty to mitigate enviornmental harm (Br. in Opp. 10-11). They then reason that further review would be inappropriate, invoking the principle (*id.* at 11) that this Court "ordinarily will not decide questions not raised or litigated in the lower courts." *City of Springfield* v. *Kibbe*, No. 85-1217 (Feb. 25, 1987), slip op. 2. This Court has adopted that principle, however, as a means of restricting its review to questions that the lower courts have considered and resolved (*ibid.*); it does not apply that principle to deny review where a lower court explicitly addresses and decides the issue. Indeed, the fact that the court of appeals decided an important issue in respondents' favor with little prompting from respondents represents a "depart[ure] from the accepted and usual course of judicial proceedings" (Sup. Ct. R. 17.1(a)) and provides yet another reason why this Court's review would be appropriate.

Respondents also err in characterizing as dictum the court of appeals' declaration that agencies must " 'mitigate the adverse effects of major federal actions' " (Pet. App. 17a (citation omitted)). The court specifically stated (*ibid.*):

> Section [102] of NEPA requires that "action be taken to mitigate the adverse effects of major federal actions." *Stop H-3 Ass'n v. Brinegar*, 389 F. Supp. 1102, 1111 (D. Hawaii 1974), *rev'd on other grounds*, 533 F.2d 434 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976). Thus an agency cannot decide to "act now and deal with the environmental consequences later." *North American Wild Sheep v. United States Dept. of Agric.*, 681 F.2d 1172, 1181 (9th Cir. 1982). Consequently, an EIS must include a thorough discussion of measures to mitigate the adverse environmental impacts of a proposed action. *Oregon Natural Resources Council* v. *Marsh*, 820 F.2d 1051, 1055 (9th Cir. 1987).



As this passage demonstrates, the court unambiguously concluded that Section 102 of NEPA (42 U.S.C. 4332) requires federal agencies to mitigate adverse environmental effects and that, *as a consequence*, the agency's environmental impact statement must include a detailed discussion of mitigation. Thus, the court of appeals' declaration that agencies have a substantive duty to mitigate environmental harm is crucial to its holding and therefore establishes circuit precedent. Indeed, it is revealing that the respondents in *Marsh* contend that "[t]he Solicitor General's objection to a substantive duty to mitigate is more properly raised in his petition for a writ of certiorari [in *Methow Valley*]" (87-1704 Br. in Opp. 6 n.4).

We have shown in our petition (at 16-18) and in our reply brief in *Marsh* (87-1704 Br. 4-5) that the court of appeals also erred in imposing a new procedural requirement that federal agencies include a detailed mitigation plan in every environmental impact statement. Respondents contend (Br. in Opp. 18-19) that under the court's holding the agency's duty to prepare a detailed mitigation plan comes into play only when the agency has relied upon the benefits of mitigation to conclude that a project's environmental effects will be acceptable. But there is no basis in the court

of appeals' opinion for respondents' suggested interpretation—which is, in any event, quite implausible since, under that interpretation, the agency's obligation to set forth a detailed mitigation plan in the environmental impact statement would depend on events that occur *after* the preparation of that document.[1]

2. Respondents indicate that they stand ready to defend the court of appeals' invalidation of the Council on Environmental Quality's (CEQ's) rescission of its "worst case" analysis regulation (Br. in Opp. 15 n.14), but they maintain that the issue is not properly raised in this case. Respondents characterize the court's instruction to the Forest Service that unless the agency develops certain wildlife information on remand it must employ a worst case analysis as a "peripheral observation" (*id.* at 12, 13) that is not "ripe for review" (*id.* at 14-15). But the agency is not free to ignore the court of appeals' instruction.[2] Should the agency find that its wildlife study is inconclusive, it must then comply with the court's mandate to prepare a "worst case" analysis—notwithstanding the

[1] Moreover, respondents' contention incorrectly characterizes how the Forest Service used its environmental impact statement—the *Early Winters Study*—in this case. The *Early Winters Study* included a thorough description of the environmental effects of the proposed project alternatives (at 65-145), and then identified certain means that would be available to ameliorate those effects (at 14-18, 68-69, 77-78). The Forest Service ultimately approved one of the *Early Winters Study*'s project alternatives and directed the development of mitigation measures described in the study. But the Forest Service did not base its approval of that project alternative on the guaranteed success of those mitigation measures, and there is no basis for respondents to impute that thought process to the agency. See Pet. App. 63a-71a.

[2] The court stated (Pet. App. 14a (footnote omitted)): "If the Forest Service finds that the new comprehensive study of the mule deer still provides incomplete information, a worst-case analysis would be required for the areas in which information is lacking."



CEQ's rescission of that regulatory requirement. While the worst case issue is, perhaps, more unavoidably presented in *Marsh* v. *Oregon Natural Resources Council, supra,* the issue is properly raised here as well. For the reasons we have stated in our petition (at 18-21) in this case, and in our petition (at 15-18) and reply brief (at 5-8) in *Marsh,* this matter was wrongly decided by the court of appeals in both cases and warrants this Court's review.

3. As we have shown in our petition (at 21-23), this Court should also review the Ninth Circuit's related holding that Forest Service regulations require the agency to incorporate a complete mitigation plan into its special use permits.[3] Respondents appear to agree (Br. in Opp. 23) with the court of appeals that the regulations require a fully developed mitigation plan for both off-site and on-site impacts. That result incorrectly imports the court of appeals' mistaken vision of NEPA's requirements into the Forest Service's regulations governing special use permits.

The Forest Service regulations at issue here require "measures and plans for the protection and rehabilitation of the environment during construction, operation, maintenance, and termination of the project" (36 C.F.R. 251.54(e)(4)) and "[t]erms and conditions which will * * * minimize damage to scenic and esthetic values and fish and wildlife habitat and othewise [*sic*] protect the environ-

[3] Respondents urge (Br. in Opp. 22) that this issue is no longer subject to this Court's review because the Forest Service will have to issue a new permit after it has completed certain revisions to the *Early Winters Study*. As an initial matter, it is not clear that a new special use permit would have to be issued. Only if the Regional Forester determines to change his decision would a new permit be necessary. Moreover, even if the revisions to the *Early Winters Study* would result in issuance of a new permit, there is no reason to expect that those revisions would lead the Forest Service to revise the mitigation conditions that were the subject of the court of appeals' holding.

ment" (36 C.F.R. 251.56(a)(1)(ii)). They do not reference NEPA's requirements, nor do they independently specify the detail necessary for compliance or the extent to which off-site or third-party mitigation measures must be incorporated. In this case, the special use permits in fact contained a variety of mitigation measures (see Pet. 22 n.25; Br. in Opp. 5-6 n.5). The court of appeals had no authority to rewrite the agency's regulations in order to find those measures inadequate.

For the reasons stated above and in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
*Solicitor General*

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# RESPONDENT'S

# BRIEF

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F. DALE ROBERTSON,
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*Petitioners,*

v.

METHOW VALLEY CITIZENS COUNCIL, *et al.*,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## BRIEF FOR RESPONDENT METHOW RECREATION, INC.

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## QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act required the Forest Service to include in the *Early Winters Study*:

   (a) a detailed plan for mitigation of environmental impacts where primary or on-site impacts are addressed through a phased environmental review process and secondary or off-site impacts can only be addressed when there is a specific proposal for secondary development; and

   (b) a "worst case analysis" of potential environmental harm if the regulation requiring such analysis has been rescinded and is being applied to a study only now underway.

2. Whether Forest Service regulations require the development of a particular kind of plan to mitigate environmental impacts prior to issuance of a special use permit for recreational use of national forest land.

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*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR RESPONDENT METHOW RECREATION, INC.

Respondent Methow Recreation, Inc. (MRI)[1] supports the position of the Solicitor General and urges this Court

1. MRI's 1978 application to the Forest Service for a special use permit to develop a major destination ski area on Sandy Butte in the Okanogan National Forest (hereinafter "Early Winters project") triggered preparation of the *Early Winters Study*. (For the Court's convenience, the Solicitor General has lodged a copy of the *Early Winters Study* with the Clerk of the Court.) MRI is a Washington corporation. It does not have any subsidiaries, but is affiliated with EWR, Inc., a Delaware corporation.

to reverse the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## STATEMENT OF THE CASE

MRI adopts the statement of the Solicitor General set forth in the Brief for Petitioners and provides the following additional statement.[2]

The decision under review in this case is the first phase of an environmental review and permitting process. An environmental impact statement (hereinafter "EIS" or "*Early Winters Study*") was prepared by the Forest Service for the Early Winters project. This EIS analyzed the environmental consequences of allowing national forest lands on Sandy Butte to be used for downhill skiing. *Early Winters Study* xvi.

This first-phase evaluation of the potential for skiing at Sandy Butte would not result directly in development. The EIS clearly noted that there would be additional opportunities for environmental review prior to actual development of the Early Winters project:

> A Forest Service decision to permit ski development at Early Winters does not authorize construction of a particular ski development, nor does it authorize development of any non-Forest Service lands. . . . Further environmental analysis and review will be required prior to any decision by the Forest Service to allow a specific development at Early Winters, and by the responsible state and local government agencies, prior to any authorization to develop non-Forest Service lands.

*Early Winters Study* 1.

Once the Forest Service determines that a general plan for ski development is environmentally acceptable, it may consider issuing a special use permit. In this second phase of review, the Forest Service requires the applicant to prepare a detailed development plan (called a "Master Plan") prior to undertaking any construction activities. *Id.* at xvi. This Master Plan describes and illustrates the specific facilities to be constructed on the ski hill. *Id.* On the basis of this specific development plan, the Forest Service evaluates environmental impacts in greater detail and determines site-specific mitigation measures. *Id.*

In the next stage of the environmental review and permitting process, attention focuses more closely on the impacts of secondary development on non-Forest Service lands. The *Early Winters Study* disclosed that there is likely to be substantial growth in the Methow Valley, the geographical location of Sandy Butte, over the next 10 to 20 years. *Id.* at 90. The *Early Winters Study* discussed the likely impacts of this growth and the accompanying development because these were the most significant impacts projected to occur;[3] no major adverse impacts

2. The appendices to the Petition for a Writ of Certiorari are cited as "Petition App., ___."

3. The focus of this case has been the impacts to the local mule deer population that may occur as a result of secondary development displacing fawning areas and migration routes, and the potential deterioration of air quality that may occur from an increase in the number of wood-burning fireplaces in secondary development. *See* Petition App., 38a.

would result directly from the development of the Early Winters project (Petition App., 67a).[4]

This off-site or secondary development is not a part of the ski area proposal, nor would it occur on land under the jurisdiction of the Forest Service. In the absence of a specific proposal for development, the EIS discussion of secondary impacts is correspondingly less detailed than that devoted to primary impacts:

> In addition to disclosing on-site impacts of the ski development at Early Winters, the EIS also discloses off-site impacts that each alternative might have on community facilities, socio-economic and other environmental conditions in the Upper Methow Valley. Since there are no pending proposals or plans to develop any off-site lands, the evaluation of off-site impacts is not site-specific. It is general in nature, acknowledging to the extent practicable the impacts associated with the growth that is likely to be induced by development of Sandy Butte for skiing.

*Early Winters Study* 1-3.

Though less detailed, the disclosure in the EIS of significant secondary impacts caused the Regional Forester to impose conditions in his decision to allow the ski area development to move forward.[5] As these impacts

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4. This conclusion has never been challenged (Petition App., 38a, 42a).

5. In his Record of Decision, the Regional Forester required that the Forest Supervisor participate with state and local agencies in the formulation of mitigation programs, and



would occur on non-Forest Service lands, the Regional Forester directed the Forest Supervisor to work cooperatively with state and local agencies to assist those agencies in responding to the impacts of future growth and development. Thus, the Forest Service decision in this case, as well as state and local laws,[6] ensure that secondary development will be subject to additional environmental review when actual projects are identified. *Early Winters Study* 1-3; *see* Petition App., 67a-70a.

The Forest Service did not intend for the *Early Winters Study* to be the final word on the environmental impacts of the ski area development: "Many areas of concern can only be resolved at later stages of the

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that efforts be substantially underway to develop and implement mitigation measures before issuance of the special use permit. *See* Petition App., 68a.

For example, the EIS warned that secondary development could significantly impact the Okanogan mule deer herd. This disclosure caused the Forest Service to require that state and local agencies formulate a plan to minimize the effects of this development on the mule deer population. This requirement, in turn, led to the initiation of a study which would identify existing conditions of the deer herd. The purpose of this study was to provide baseline information for a better understanding of the environmental impacts of future development. (Petition App., 42a.) *See also infra* note 17.

6. Washington has a "little NEPA," the State Environmental Policy Act, which requires state and local agencies to engage in detailed environmental review of "major actions." Revised Code of Washington, ch. 43.21C (1983 & West Supp. 1988).

planning process." *Early Winters Study* xvi. The express purpose of discussing secondary effects in the EIS was to provide a more complete picture of the likely impacts of ski development, in order to alert the public and those governmental agencies with jurisdiction to the issues which may arise in the future.[7] *Early Winters Study* 3.

The court of appeals failed to acknowledge the relationship between the *Early Winters Study* and the sequence of environmental review adopted by the Forest Service.

## SUMMARY OF THE ARGUMENT

MRI joins in the arguments presented by the Solicitor General and adds the following:

1. The well-established precedent of this Court holds that the National Environmental Policy Act (NEPA) "does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978). The only role for a court is to ensure that an agency has taken a "hard look" at the environmental consequences of a proposed action. *Kleppe v. Sierra Club*, 427 U.S. 390,

7. In his response to the administrative appeal filed by the Methow Valley Citizens Council (MVCC), the Chief of the Forest Service reiterated that additional environmental review would occur in the future (Petition App., 58a).



410 n.21 (1976). In the case of the proposed use of Forest Service lands on Sandy Butte for skiing, there can be no doubt that the Forest Service took a "hard look" at the probable environmental impacts.

2. In preparing the *Early Winters Study*, the Forest Service determined that NEPA compliance was best fulfilled by phasing the review of primary or on-site impacts of development. This determination is consistent with regulations issued by the Council on Environmental Quality (CEQ). *See* 40 C.F.R. §§ 1502.20, 1508.28; *Village of False Pass v. Clark*, 733 F.2d. 605, 615-16 (9th Cir. 1984). The court of appeals utterly failed to acknowledge, much less show any deference to, the agency decision to phase environmental review.

3. The probable significant impacts of the ski area are those related to induced growth and accompanying secondary development. The EIS discussion of these secondary impacts and related mitigation measures is less detailed than that devoted to primary impacts. This approach is consistent with NEPA. *See Enos v. Marsh*, 769 F.2d. 1363, 1372-73 (9th Cir. 1985). The basis for this distinction is that secondary development may be the result of, but is not a part of, the Early Winters project; there is no specific proposal for development of non-Forest Service lands. Regulation of this unknown future development, including the mitigation of probable impacts, will be the responsibility of state and local agencies. Therefore, the court of appeals erred in holding the EIS inadequate for failing to include a detailed mitigation plan.

4. Forest Service regulations do not require the adoption of a particular kind of mitigation plan prior to the issuance of a special use permit. *See* 36 C.F.R. §§ 251.54(e)(4) and 251.56(a)(1)(ii). The court of appeals failed to defer to the Forest Service's interpretation of its own regulations. *See Lyng v. Payne*, 476 U.S. 926, 939 (1986). The court also erred in equating the analysis of NEPA requirements with the analysis of the Forest Service special use permit regulations, contrary to its own approach in *Preservation Coalition, Inc. v. Pierce*, 667 F.2d. 851, 859 (9th Cir. 1982).

5. Finally, the court of appeals erred in holding that a "worst case analysis" would be required if future studies indicate that environmental information is lacking. The CEQ rescinded the "worst case analysis" regulation in 1986, and that determination is entitled to substantial deference. *See Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979). Moreover, the worst case analysis is not a codification of prior NEPA case law, as the court of appeals asserts. In any event, the worst case analysis requirement would not apply to the particular study identified by the court of appeals, regardless of whether information was lacking.

The court of appeals' decision misconstrued NEPA, improperly invaded the discretion of the Forest Service and the district court, and disregarded the mandates of this Court.



## ARGUMENT

### I. THE DISCUSSION OF MITIGATION MEASURES IN THE EIS WAS ADEQUATE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT.

MRI joins in the arguments presented by the Solicitor General. MRI also wishes to stress that the underlying issue in the questions presented to this Court is the adequacy of an EIS prepared for the limited purpose of determining whether Forest Service lands on Sandy Butte should be used for skiing.

The court of appeals held the discussion of mitigation measures in the EIS to be inadequate. The apparent reasons for this holding are that the discussion was not detailed enough, and some mitigation measures seemed to the court to be uncertain in their implementation (Petition App., 17a-19a). In so holding, the court of appeals ignored the stated purpose of the EIS, substituted its judgment as to the environmental consequences of the proposed action, and neglected to defer to the Forest Service decision as to how best to proceed under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (NEPA). The court of appeals thus failed to heed the mandates established by this Court over the last decade.

#### A. The Proper Judicial Role Is to Ensure that an EIS Fulfills the Purposes of NEPA.

In reviewing the adequacy of an EIS, this Court has focused on whether the EIS in a particular case advances the purposes of NEPA. These purposes are to inform the decision-maker as to a proposal's probable impacts and to assure the public that the agency considered those

impacts. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983). The various courts of appeal, including the Ninth Circuit, have characterized this test as the "rule of reason." Under the "rule of reason," an EIS must include "[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences" of a project. *See, e.g., Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974).

In applying the "rule of reason" to questions of EIS adequacy, lower courts have had to be mindful of the proper judicial rule under NEPA. In *Kleppe v. Sierra Club*, this Court explained that "[t]he procedural duty imposed upon agencies by [the EIS requirement of NEPA] is quite precise, and the role of the courts in enforcing that duty is similarly precise." 427 U.S. 390, 406 (1976). This Court also stated that:

> The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'

*Id.* at 410 n.21 (citation omitted).[8]

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8. This Court also has cautioned that attempts to relitigate factual issues on appeal are inappropriate. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) (citations omitted). Notwithstanding this admonition, the court of appeals inexplicably ignored or overturned the district court's findings of fact on every issue. The court's independent fact-finding is glaringly evident in its holding as to the adequacy of the EIS discussion of air quality impacts to the Pasayten Wilderness. (Continued on following page)



NEPA and its implementing regulations anticipate that federal decision-makers will need to use informed judgment as to the appropriate scope of an EIS and the discussion of impacts and mitigating measures in the EIS. *See, e.g., Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978); *Kleppe*, 427 U.S. at 410 n.21. "As *Vermont Yankee* made clear, NEPA does not require agencies to adopt any particular internal decisionmaking structure." *Baltimore Gas*, 462 U.S. at 100.

### B. The Decision to Phase Environmental Review Is Consistent with NEPA.

The court's expansive holding as to EIS adequacy appears to apply to the mitigation measures for both primary and secondary impacts, (Petition App., 19a), although there is no discussion of this distinction in its

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(Continued from previous page)

The court of appeals found that the EIS conclusion that the Pasayten Wilderness would not be impacted was based upon an "egregiously incorrect" assumption about land elevations in the area (Petition App., 15a). The court is simply mistaken; the EIS makes no such assumption. There was an incorrect assumption, but it was made by MRI's expert witness, who went on to testify that this error did not alter his opinion that the EIS conclusion was correct. Reporter's Transcript (hereinafter "RT ___") 259-60. The district court agreed (Petition App., 45a). The court of appeals, starting with the cavalier proposition that "[i]ncorrect assumptions usually lead to incorrect conclusions" (Petition App., 15a), fails to heed the trial court's evaluation of the testimony.

opinion.[9] The court's decision never even acknowledged that the Early Winters Study is part of a phased environmental review and permitting process. *Id.* at 1a-19a.

In its decision to phase the environmental review of on-site or primary impacts, the Forest Service properly exercised its discretion under the guidelines issued by the Council on Environmental Quality (CEQ), which state that:

> Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28).

40 C.F.R. § 1502.20.[10]

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9. The irony of the court's holding is that even respondent MVCC apparently agrees that an appropriate process has been identified for imposing detailed mitigation measures for primary or on-site impacts. Their disagreement is with the level of detail for mitigation measures associated with secondary or off-site development which is not a part of the ski area project under review. *See* Respondents' Brief in Opposition to Petition for Writ of Certiorari at 5-6 n.5.

10. References herein are to the "phasing" of environmental review. "Phasing" has the same meaning as the term "tiering" used by CEQ. "Tiering" is defined as the coverage of general matters in broader EISs, with subsequent EISs incorporating the general discussions by reference and concentrating solely on issues specific to the statement subsequently prepared. 40 C.F.R. § 1508.28. "Tiering" is explicitly approved when the sequence of statements is from the analysis of a plan or program, to a site specific analysis. *Id.* This definition exactly corresponds to the phasing of the *Early Winters Study*: analysis of the use of national forest lands on Sandy Butte for downhill skiing, followed by analysis of the impacts of a specific ski area proposal.



The phasing of environmental review is an approach endorsed by the Ninth Circuit and other courts of appeal.[11] The rationale for this approach is that deferral to future phases of environmental review is appropriate where project information is uncertain. This allows the EIS to focus on those issues ripe for decision, while postponing consideration of other issues until there is adequate information available. For example, where the agency maintains the power to modify a proposal as part of further environmental review, deferral of portions of the analysis to a subsequent phase of review does not violate the "rule of reason." *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1378 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978).

Phasing of the environmental review process correspondingly shapes the content of each environmental document which is a part of that process. Here, the *Early Winters Study* analyzed the primary impacts and mitigation measures for those impacts, while noting that more detailed review would occur when a specific development plan is presented. *Early Winters Study* 1. The decision of the Forest Service to phase environmental review of the ski area project was based on a reasonable determination as to how best to fulfill the requirements of

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11. *See, e.g., Village of False Pass v. Clark*, 733 F.2d 605, 615-16 (9th Cir. 1984); *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1378 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978).

NEPA. This discretionary determination was ignored by the court of appeals.[12]

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12. The court similarly refused to accept the Forest Service's definition of the proposed action. This determination is analogous to the decision to phase environmental review because in both situations the agency is defining the scope of the proposal under consideration. For example, the court of appeals appears to agree that the reasonableness of the alternatives depends essentially upon the scope of the proposed action as defined by the agency (Petition App., 9a). The stated purpose of the *Early Winters Study* was to provide the Forest Service with the information required to evaluate whether to issue a special use permit for downhill skiing on Sandy Butte. *Early Winters Study*, iii, xvi, 1, D-5. The court of appeals, without explanation, redefined the proposal in the broadest possible terms: "to provide a 'winter sports opportunity' " (Petition App., 9a). The court thus converted the analysis of a ski area at Sandy Butte into a programmatic inquiry into the recreational opportunities available on Forest Service lands. The court's disregard of the agency's determination of the nature of the proposed action is in direct conflict with the holdings of this Court. *Strycker's Bay*, 444 U.S. at 227; *Vermont Yankee*, 435 U.S. at 551; *Kleppe*, 427 U.S. at 399-402; *see also City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986), *cert. denied*, ___ U.S. ___, 108 S. Ct. 197 (1987).

The court of appeals' holding as to the adequacy of the alternatives in the EIS shows the waste of resources which results from an appellate court invading the discretionary decision of an agency. The court suggested that on remand the Forest Service should "more clearly articulate its goal" (Petition App., 11a). The irony in the court's suggestion is that apparently only the court of appeals is unclear about the proposal under consideration. Neither the Forest Service, nor the district court, expressed any uncertainty as to the scope of the action. *See* Petition App., 36a. Therefore, the court's holding puts the Forest Service in the awkward position of having to redefine the scope of a proposal that it already finds clear.



### C. The EIS Discussion of Mitigation Measures for Secondary Impacts Is Adequate Under NEPA.

The court of appeals also found the discussion of secondary impact mitigation to be inadequate. In doing so, the court failed to discern that the level of detail for mitigation measures may vary according to whether the impacts sought to be mitigated are primary or secondary in nature.[13] The issue is not only whether a fully developed mitigation plan must be presented in the EIS, as the Solicitor General states, but whether a less detailed discussion of the mitigation of secondary impacts accords with NEPA.

#### 1. *Distinguishing between mitigation of primary and secondary impacts in an EIS is consistent with NEPA.*

The EIS distinguished between primary and secondary impacts in the level of detail devoted to the discussion of impacts and mitigation measures.[14] This

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13. In concluding that the EIS was inadequate, the court misconstrued the reason that the Forest Service and district court distinguished between primary and secondary environmental impacts. The court seemed to assume that these two types of impacts were distinguished to avoid a discussion of secondary impacts in the EIS. *Compare* Petition App., 11a *with* 38a. This assumption is entirely unfounded. In fact, a substantial portion of the EIS was devoted to the secondary impacts of development which could be induced by the ski area project. *See, e.g., Early Winters Study*, 65-71, 73-76, 79-101, 121-135.

14. Distinguishing the level of detail for primary and secondary impact analysis is supported by the same rationale as "tiering" or phasing of environmental review because the secondary development is yet to be defined. To require an EIS

distinction is consistent with NEPA and this Court's decision in *Kleppe*, 427 U.S. 390 (1976).

The issue in *Kleppe* was whether an EIS was needed on coal development in the entire Northern Great Plains region or whether more localized environmental review was adequate. The Court held that environmental review of more localized projects was not a reasonable requirement under NEPA because there was no specific proposal for such projects before the agency. 427 U.S. at 409-15. Projects which were merely "contemplated" did not have to be included in the EIS. *Id.* at 411 n.20.

The Early Winters project presents an analogous situation. The specific proposal before the Forest Service is to allow use of Forest Service lands on Sandy Butte for skiing. There is no specific proposal for secondary development of non-Forest Service lands. Consistent with *Kleppe*, the *Early Winters Study* thus focused on the only specific proposal that was identifiable. As a result, the discussion of the impacts of secondary development, and mitigation measures for those impacts, is less detailed than that for primary impacts.

In focusing the EIS in this fashion, the Forest Service adopted the well-recognized approach, endorsed in the Ninth Circuit as well, of distinguishing between primary and secondary impacts. *See Enos v. Marsh*, 769 F.2d 1363,

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to detail the impacts of unknown future development would be as meaningless an exercise as requiring an EIS to detail the impacts of unspecified parts of a proposed action. *Cf. County of Suffolk*, 562 F.2d at 1378 (deferral of impact analysis of unknown future phases of oil lease program is reasonable).



1373 (9th Cir. 1985) (approving a less detailed discussion of secondary impacts since " . . . such consequences are speculative, and dependent upon local development and zoning policies.")[15] The district court, citing *Enos*, considered the uncertainty involved in assessing secondary effects in applying the rule of reason to its determination of the adequacy of the *Early Winters Study* (Petition App., 38a). The court of appeals found error in the district court's consideration of the indirect nature of the impacts without even acknowledging the precedent established in *Enos*.[16]

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15. *See also Concerned Citizens on I-190 v. Secretary of Transportation*, 641 F.2d 1, 6 (1st Cir. 1981) (approving a less detailed discussion of secondary impacts because of the " . . . 'highly speculative nature of [projected] growth' and 'the existence of continuing opportunities to limit its adverse effects' "); *Minnesota Public Interest Research Group v. Adams*, 482 F. Supp. 170, 177 (D. Minn. 1979) (unreasonable to require specific detailed reports where impacts are from development which has yet to occur and the magnitude of which is plainly unknown).

16. Not only is the court of appeals' decision inconsistent with the statute, as the Solicitor General states, but the court also misapplied case law as to the level of detail required for mitigation measures. First, the court failed to note that *Enos* expressly distinguishes *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975) and *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774 (9th Cir. 1980), the two cases upon which the court relies almost exclusively (Petition App., 11a-12a). Second, the only authority cited by the court are cases which deal with direct or primary impacts, rather than secondary impacts. *See* cases cited at Petition App., 17a: *Foundation for North American Wild Sheep v. United States Dep't of Agriculture*, 681 F.2d 1172, 1175 (9th Cir. 1982) (effects of constructing a road "directly

The discussion of mitigation measures for secondary impacts was less detailed in the *Early Winters Study* because there is no specific proposal pending for secondary development and such development, when it does occur, will be under the control of other jurisdictions. The Forest Service and the district court acted reasonably in distinguishing between primary and secondary impacts, as to the level of detail required for measures to mitigate these impacts. *See Enos*, 769 F.2d at 1373; *Concerned Citizens on I-190 v. Secretary of Transportation*, 641 F.2d 1, 6 (1st Cir. 1981); *Minnesota Public Interest Research Group v. Adams*, 482 F. Supp. 170, 177 (D. Minn. 1979).

2. *The EIS adequately discussed mitigation of air quality impacts.*

Although the court held the discussion of secondary impact mitigation to be inadequate as to all elements of the environment, there was only one issue discussed specifically: whether state air quality standards for Total

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through the area occupied by one of the few remaining herds of Desert Bighorn Sheep"); *Oregon Natural Resources Council v. Marsh*, 832 F.2d 1489 (9th Cir. 1987), *cert. granted sub nom. Marsh v. Oregon Natural Resources Council*, No. 87-1704 (June 27, 1986) (direct effects of dam construction on wildlife habitat); and *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688 (9th Cir. 1986), *rev'd on other grounds sub nom. Lyng v. Northwest Indian Cemetery Protective Ass'n*, 108 S. Ct. 1319 (1988) (direct effects of road construction and timber harvesting on water quality). The court was mistaken in its reliance on primary impact cases to determine whether secondary impacts were adequately discussed.



Suspended Particulates would be exceeded due to secondary development in the area surrounding Sandy Butte. In a single, incomprehensible paragraph, the court actually acknowledged that the EIS discloses significant air quality impacts and that an air quality management program was required by the Forest Service, but then ignored the scope of the EIS, the indirect nature of the impact, and the mitigation measures described in the documents before it (Petition App., 16a).

In his Record of Decision, the Regional Forester stated that the Forest Supervisor must be satisfied before issuance of the special use permit that Okanogan County will implement an effective air quality management plan (Petition App., 68a).[17] Portions of that plan have already been adopted and are at this moment mitigating the impacts of new development in the area surrounding Sandy Butte.[18]

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17. The Forest Service required Okanogan County to adopt an air quality management plan designed to effectively minimize the deterioration of air quality that was projected to occur as the population grew and wood-burning fireplaces multiplied. Petition App., 68a. Such fireplaces are the most significant contributor to increases in Total Suspended Particulates. *Early Winters Study* 65-66.

18. By the time this case proceeded to trial, this management plan was well underway. Petition App., 45a. The Court is urged to take judicial notice of the fact that, since the time of trial, the Okanogan County Board of Health adopted a regulation which limits installation of wood-burning fireplaces in new development. This regulation became effective December 9, 1986. Okanogan County Board of Health, Methow Valley Air Quality Regulation, adopted September 9, 1986.

Both with respect to the EIS in general and air quality in particular, the court of appeals erred in requiring a greater level of detail in the discussion of mitigation measures. One cannot read the *Early Winters Study* and avoid coming away with an awareness that secondary growth is the major significant effect of the ski area, mule deer and air quality are threatened by the development expected to accompany this growth, and that mitigation measures have been seriously considered. NEPA requires nothing less – or more.

### D. NEPA Does Not Establish a Substantive Duty to Impose Mitigation Measures.

Not only did the court of appeals err as to the necessary level of detail for mitigation measures, but the court also has the fundamentally mistaken view that NEPA establishes a substantive duty to impose mitigation measures. As the Solicitor General demonstrates, neither NEPA, nor CEQ regulations, nor the decisions of this Court, impose a duty on an agency to adopt mitigation measures.

An agency must identify and consider mitigation measures in the EIS (40 C.F.R. §§ 1502.14(f), 1502.16(h)), and must state in its ultimate decision whether it has adopted mitigation measures (40 C.F.R. § 1505.2). However, the CEQ regulations do not impose a duty to actually adopt mitigation measures. NEPA imposes essentially procedural mandates on agencies. *Vermont Yankee*, 435 U.S. at 558. The court of appeals erred in presuming otherwise, and from its mistaken premise, is lead to the mistaken conclusion that the EIS discussion of mitigation measures was inadequate.



In essence, the court of appeals fundamentally misconstrued the purposes of an EIS. These purposes are to inform the decision-maker as to a proposal's probable impacts and to assure the public that the agency considered those impacts. *Baltimore Gas*, 462 U.S. at 97. The EIS is not the document granting or denying a special use permit. A separate document is issued wherein the decision-maker analyzes the information in the EIS, applies other relevant considerations, and reaches a decision on whether to grant a permit.[19] Thus, the EIS is not inadequate for failing to include a complete mitigation plan or all other conceivable considerations that may be relevant to a decision-maker. NEPA does not require that environmental concerns be elevated over other appropriate considerations. *Strycker's Bay*, 444 U.S. at 227.

In furtherance of its mistaken view that there is a substantive duty to mitigate environmental impacts, the court of appeals insisted that mitigation within the control of third parties be described with certainty in the EIS. (Petition App., 19a.) The court thus placed an unreasonable burden on the Forest Service to provide assurances in its EIS that third parties will implement mitigation measures for development that has not even yet been proposed. *See Adams*, 482 F. Supp. at 177.

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19. Such a document was prepared here as the Record of Decision. *See* Petition App., 63a-71a. In addition, the special use permit process requires preparation of a detailed master plan, with its own process for environmental review. *See Early Winters Study* xvi, 1; *see also infra* note 9.

The court of appeals erred as a matter of law in imposing a substantive duty on the Forest Service to mitigate environmental impacts.

## II. FOREST SERVICE SPECIAL USE PERMIT REGULATIONS DO NOT REQUIRE A PARTICULAR KIND OF MITIGATION PLAN.

The court of appeals did not list the propriety of the Forest Service special use permit as one of the issues to be decided in the case (Petition App., 3a). The court nonetheless held in a footnote that the Forest Service decision to issue the permit was "none other than arbitrary, capricious and an abuse of discretion." (Petition App., 5a n.3.) With no citation of authority, relying solely on its own novel interpretation of Forest Service regulations,[20] the court held that those regulations require an "adequate mitigation plan." *Id.* The court asserted that since the mitigation plan was inadequate under NEPA, it must be inadequate under the Forest Service regulations. *Id.*

The court of appeals not only misinterpreted NEPA, but also misconstrued the Forest Service regulations which govern issuance of a special use permit. Those regulations do not even mention a "mitigation plan," but instead leave to the discretion of the Forest Service the appropriate means of minimizing damage to environmental resources. *See* 36 C.F.R. § 251.56(a)(1)(ii).

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20. *See* 36 C.F.R. §§ 251.54(e)(4) and 251.56(a)(1)(ii). The relevant portions of these Forest Service regulations are reprinted at Petition App., 75a-76a.



Circumstances can easily be imagined where the Forest Service would choose, in its discretion, a particular method for minimizing such damage, depending upon the nature of a project's environmental impacts. Here, for example, the Forest Service is concerned with specific mitigation of the primary impacts of the ski area project. The Forest Service must defer to state and local agencies for mitigation of the impacts of secondary development which will occur on non-Forest Service lands. These circumstances require the Forest Service to be sensitive to state and local agency authority when exercising its discretion as to the scope of the mitigation measures in a special use permit.

The court of appeals erred further by ignoring the holdings of this Court that deference is due to an agency's interpretation of its own regulations. *Lyng v. Payne*, 476 U.S. 926, 939 (1986) (citing as an "established proposition" that "an agency's construction of its own regulations is entitled to substantial deference"). In *Preservation Coalition, Inc. v. Pierce*, the court of appeals recognized that the analysis of compliance with NEPA was totally distinct from the analysis of compliance with other federal regulations. 667 F.2d at 858-59. Here, the court of appeals ignored its own warning and construed both NEPA and the Forest Service regulations as if they were co-extensive. There is simply no authority to support the court's holding that issuance of the Forest Service special use permit was improper.

## III. THE RESCINDED CEQ REGULATION REQUIRING A "WORST CASE ANALYSIS" DOES NOT APPLY IN THIS CASE.

The court of appeals held that if the post-EIS study of mule deer provided incomplete information, a "worst case analysis" would be required.[21] (Petition App., 14a).[22] This decision was made notwithstanding the rescission of the portion of the CEQ regulation requiring a "worst case analysis."[23]

21. The court reached this conclusion in the course of analyzing the EIS discussion of impacts to mule deer. The court's analysis of the adequacy of this discussion is seriously flawed. The district court found that the EIS adequately discussed potential impacts to mule deer, recognizing that the "discussion of off-site impacts on deer herds was more difficult because of uncertainty about where other public and private lands may ultimately be developed." (Petition App., 39a-40a.)

The court of appeals concluded otherwise by revisiting the trial testimony and ignoring the indirect nature of the impact. *Id.* at 13a-14a. The court of appeals determined that the "Forest Service's own witness" found the data on mule deer to be insufficient. *Id.* The opinion of the witness referred to by the court of appeals, a wildlife biologist with the Washington Department of Game, pertained only to the quality of the existing data for assessing the impacts of "residential development" rather than to its utility as a data base for the *Early Winters Study*. RT 280. In fact, he testified that he was unaware of any residential development associated with the project. RT 296-97. He also testified that the Department of Game believed that the existing data represented "current state-of-the-art." RT 305.

In assessing the efficacy of the EIS discussion of mitigation measures, the district court recognized that a number of federal, state and local agencies had undertaken an extensive study of the mule deer population to facilitate the development of a plan to mitigate the impacts of future development (Petition App., 42a). The court of appeals acknowledged the



### A. The "Worst Case Analysis" Requirement Is Not a Codification of Prior NEPA Case Law.

The holding of the court of appeals is based on the view that rescission of the regulation is ineffective because the "worst case analysis" requirement was "merely a codification of prior NEPA case law" (Petition App., 13a n.11). MRI joins in the Solicitor General's argument that the court has mistakenly derived this view

ongoing study of the mule deer herd, but incorrectly characterized its purpose as "providing information essential to assessment of the environmental impacts of the proposed action . . . ." *Id.* at 13a. The study was undertaken to implement the Record of Decision. *Id.* at 42a. The study was not attempting to reassess the impacts of the *Early Winters Study*, but rather was the first step in a multi-agency process designed to develop a plan to manage the mule deer herd and to minimize the effects of development that the EIS discloses will take place in the future. *Id.*

22. Both the rescinded and current versions of the CEQ "worst case analysis" regulation, 40 C.F.R. § 1502.22, are reprinted at Petition App., 73a-75a.

23. It is of no consequence that the original version of the "worst case analysis" requirement was in effect at the time the *Early Winters Study* was prepared, since the court of appeals is not applying the "worst case analysis" requirement to the *Early Winters Study* itself. Rather, the court seeks to apply this requirement prospectively to a deer herd study initiated in response to the Record of Decision in this case. *See* Petition App., 42a.

from *Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983). There is general discussion in *Sigler* that NEPA contemplates how an agency is to proceed when information is uncertain. However, both *Sigler* and the Ninth Circuit have failed to distinguish between the subsections of the CEQ regulation, each of which has varying applicability.

Subsection (a) of 40 C.F.R. § 1502.22 (1985) describes the situation where information relevant to a choice among alternatives is not known, but could be obtained without exorbitant costs. In this situation, the agency must obtain the information and include it in the EIS. Subsection (b) describes two additional situations which an agency may face. The first is where information essential to a choice among alternatives is not known, yet would be exorbitant to obtain. The second situation is where information is important to the decision, but the means to obtain it are not known, for example the means are beyond the current state of the art. Only under subsection (b), and then only when the predicate findings have been made, is there a requirement for a "worst case analysis."

The court in *Sigler* and the court of appeals here have failed to adequately distinguish the very different situations provided for in the regulation. Although the prior regulation may have codified the general approach an agency should take when essential information was lacking, the specific requirement for a "worst case analysis" only applied to the situations described in subsection (b). It is incorrect to presume, as the court of appeals did, that the "worst case analysis" provision applied whenever information was lacking (Petition App., 14a). The court thus erred in holding that the now-rescinded "worst case



analysis" requirement was a codification of prior NEPA case law.

### B. The "Worst Case Analysis" Requirement Does Not Apply to the Deer Herd Study.

The court also misapplied the "worst case analysis" regulation by disregarding all of the predicate findings which must be made in order to trigger this part of the regulation. The first predicate for application of the "worst case analysis" requirement is that the information is relevant to a "reasoned choice among alternatives. . . ." An additional predicate is that such information is not known and the overall costs of obtaining it are exorbitant, or the information is relevant to adverse impacts and the means to obtain it are not known. 40 C.F.R. § 1502.22(b) (1985).

The court of appeals made none of the findings necessary to trigger the "worst case analysis" regulation. First, the deer herd study is not relevant to a choice among alternatives; the purpose of the study is to establish existing conditions in the deer herd population, so that the impacts of secondary development can be handled effectively by state and local agencies. *See* Petition App., 42a. Second, there has been no claim made that the costs of obtaining that information are exorbitant.

Finally, there has been no contention that the means of obtaining information about the deer herd are unknown. Any uncertainty in assessing the potential adverse effects to the mule deer herd is due to the speculative nature of secondary impact analysis, *see Enos v.*

*Marsh*, 769 F.2d at 1373, not the insufficiency of the available information or the inability to obtain it when future development is actually proposed.[24]

### C. The "Worst Case Analysis" Requirement Is Only One Means of Implementing the Goals of NEPA.

MRI also joins in the Solicitor General's argument that the court erred in implying that "worst case analysis" is the only means available for implementing the goals of NEPA where reasonable forecasting of uncertain events is required. The "worst case" methodology is one way to proceed when relevant information is unavailable, and may be most applicable where the missing information relates to the direct impacts of a proposed action.

A reasonable alternative approach for dealing with uncertainty, pursued in the case here, is to require additional post-EIS studies, so that agencies can respond more effectively to secondary development when it is actually proposed. The court of appeals ignored the reasonableness of the Forest Service's approach, however, and without any authority for doing so, implied that the "worst case analysis" was the only way to comply with NEPA. The court of appeals has thus failed to follow this Court's directive in *Andrus v. Sierra Club*, that the CEQ's judgment is entitled to "substantial deference,"

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24. Testimony at trial revealed that the Washington State Department of Game felt there was insufficient "reason or evidence or probability to relate Early Winters specifically to a reduction in deer numbers," presumably due to the speculative nature of secondary impact analysis. RT 413, 417.



even when the agency has changed its regulations governing NEPA compliance. 442 U.S. 347, 358 (1979). Once again, the court is out of step in trying to impose its own peculiar view of NEPA compliance.

## CONCLUSION

For the foregoing reasons, MRI urges this Court to reverse the court of appeals' decision in this case.

Respectfully submitted,

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# PETITIONER'S

# BRIEF

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No. 87-1703

# In the Supreme Court of the United States

OCTOBER TERM, 1988

F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE, ET AL., PETITIONERS

*v.*

METHOW VALLEY CITIZENS COUNCIL, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE PETITIONERS

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## QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act requires federal agencies to include in each environmental impact statement: (a) a fully developed plan to mitigate environmental harm; and (b) a "worst case" analysis of potential environmental harm if relevant information concerning significant environmental effects is unavailable or too costly to obtain.

2. Whether the Forest Service may issue a special use permit for recreational use of national forest land in the absence of a fully developed plan to mitigate environmental harm.

## PARTIES TO THE PROCEEDING

The petitioners are F. Dale Robertson, Chief of the Forest Service; James Torrence, Regional Forester; William D. McLaughlin, Supervisor, Okanogan National Forest; and the Forest Service.

The respondents are Methow Valley Citizens Council; Washington Environmental Council; Sierra Club; and Methow Recreation, Inc.

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# In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1703

F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE, ET AL., PETITIONERS

*v.*

METHOW VALLEY CITIZENS COUNCIL, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE PETITIONERS

### OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-19a) is reported at 833 F.2d 810. The decision of the district court (Pet. App. 20a-47a) is not yet reported.

### JURISDICTION

The court of appeals entered its judgment on December 1, 1987. On February 18, 1988, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 30, 1988. On March 23, 1988, Justice O'Connor further extended the time for filing the petition to and including April 14, 1988, and the petition was filed on that date. This Court granted the petition for a writ of certiorari on June 27, 1988, consolidating this case with *Marsh* v. *Oregon Natural Resources Council*, No. 87-1704.[1] The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

[1] We have simultaneously submitted a separate brief in *Marsh*.

## STATUTES AND REGULATIONS INVOLVED

Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. 4332, provides, in relevant part:

> The Congress authorizes and directs that, to the fullest extent possible: * * * (2) all agencies of the Federal Government shall—
>
> * * * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Pertinent excerpts from the federal regulations involved in this case are reproduced in the Addenda.

## STATEMENT

Petitioners seek reversal of a court of appeals decision overturning a magistrate's determination that the Forest Service had fully complied with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, and the agency's regulations in deciding to issue a special use permit for the proposed Early Winters Ski Area in the Okanogan National Forest.



1. Beginning in the late nineteenth century, Congress took a series of legislative steps to provide for planned multiple use and development of the Nation's forests. See generally Wilkinson & Anderson, *Land and Resource Planning in the National Forests*, 64 Ore. L. Rev. 1, 15-90 (1985). Congress's actions have led to the creation of the National Forest System, managed by the Department of Agriculture's Forest Service. Congress has specifically directed the Forest Service to administer the national forests for a variety of sometimes conflicting uses, including "outdoor recreation, range, timber, watershed, and wildlife and fish purposes." Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. 528 *et seq.* See also National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.* As part of this multiple-use program, the Forest Service has permitted the development of 170 alpine ski areas within these federally reserved lands. See H.R. Rep. 99-709, 99th Cong., 2d Sess. Pt. 1, at 2 (1986). The ski areas, which occupy less than 1/20th of 1 percent of the national forest lands, account for more than 6 percent of recreational visitor use of the forests (*ibid.*).[2]

In 1968, Congress established the North Cascades National Park and directed the Secretaries of Agriculture

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[2] In 1986, Congress explicitly recognized that national forests often embrace terrain uniquely suitable for skiing and created a special permitting process for developing ski areas. National Forest Ski Area Permit Act of 1986, 16 U.S.C. (Supp. IV) 497b. Prior to 1986, a ski area operating within a national forest required two Forest Service permits: one permit, covering up to 80 acres, was issued for a total of 30 years; a second permit, encompassing the remainder of the ski area, was issued subject to annual renewals. See 16 U.S.C. 497, 551. The second permit, which posed an annual prospect of non-renewal or changed permit conditions, impeded a developer's ability to obtain financing for its capital-intensive facilities, which often involve "thousands of acres on which construction, operation and maintenance may take place" (H.R. Rep. 99-709, *supra*, Pt. 1, at 2). The new law encourages ski area development by replacing the dual permits with single 40-year permits (*id.* at 3).

and the Interior to designate portions of that enclave and adjacent national forests for public uses, including camping and ski areas. Act of Oct. 2, 1968, §§ 101, 504, 16 U.S.C. 90, 90d-3. Pursuant to this specific congressional directive, the Forest Service prepared a report, entitled the *North Cascades Winter Sports Study* [hereinafter *North Cascades Study*] to compare existing and potential ski areas in the national forests of the North Cascades and to recommend further ski development alternatives. The *North Cascades Study*, which was completed in 1970, concluded that existing ski areas could and should be expanded and identified a single site as suitable for development of a "major destination ski resort."[3] That site, a 6,000-foot mountain known as Sandy Butte, is located in the Methow Valley region of the Okanogan National Forest.

2. In 1978, Methow Recreation, Inc. (MRI) applied to the Forest Service for a "special use" permit, pursuant to 36 C.F.R. 251.50, to build and operate an alpine ski resort at Sandy Butte that would be known as the Early Winters Ski Area. The Forest Service thereupon commenced the standard procedures that it normally employs for evaluating major development proposals. The Forest Service first conducts a thorough environmental and a preliminary financial analysis to determine whether the project concept is sound. If the Forest Service determines that the general scheme for development is acceptable, it may issue a special use permit, but the developer's construction and operation of the project will be conditioned upon the creation of an acceptable master plan for development.[4] The Forest Service next reviews the

[3] A "major destination ski resort" is a large, multiple-season ski area with sufficient ski runs, adequate vertical rise, sufficiently varied activities and high-quality base facilities to entice vacationers to travel long distances and to stay several days at the site.

[4] This conditional special use permit typically establishes the basic financial terms of the permit, includes general restrictions on future



developer's proposed master plan. Based on this proposed plan, and before the plan's approval, the Service also completes an additional environmental analysis of on-site impacts. Only after completion of the second environmental analysis and final approval of the completed master plan may the developer begin construction. All construction and operation of the facility must be in accordance with both the special use permit's requirements and the approved master plan.

The Forest Service conducted its initial environmental analysis of the MRI proposal by preparing an environmental impact statement (EIS), known as the *Early Winters Study*, in accordance with Section 102 of NEPA, 42 U.S.C. 4332, and in cooperation with the state and local governments.[5] The stated purpose of the *Early Winters*

operation, and entitles the developer to conduct on-site exploration in order to generate a master plan for the project, which – in the case of a ski resort – generally requires a substantial investment and consumes three to five years. As noted above, the permit, by itself, does not allow the developer to engage in any construction activities on forest land. It does, however, provide the developer with an assurance – before continuing a lengthy and expensive planning process – that the Forest Service will not authorize another developer to undertake the proposed project.

[5] The final environmental impact statement – formally entitled the *Early Winters Alpine Winter Sports Study* and sometimes referred to as an "FEIS" – was released on August 31, 1984 (49 Fed. Reg. 34,575). The Forest Service completed and circulated a draft of the *Early Winters Study* in 1982, but delayed release of the final version while Congress considered including Sandy Butte in a proposed wilderness area. On July 3, 1984, Congress passed the Washington State Wilderness Act of 1984, Pub. L. No. 98-339, 98 Stat. 299, designating as wilderness certain portions of the National Forest System in Washington – not including Sandy Butte – and directing that "other National Forest System lands in the State of Washington be available for nonwilderness multiple uses" (§ 2(b), 98 Stat. 299). The Senate Report accompanying the Act spoke directly to the issue of further development at Sandy Butte:

*Study* was to provide the Forest Service with "the information required to evaluate the potential for skiing at Early Winters, to assist in making a decision whether to issue a special use permit for downhill skiing on all or part of [Sandy Butte]" (*Early Winters Study* 1). The *Study* gave detailed consideration to five alternative levels of development, including a "no development" alternative (Alternative I), and identified the second highest level (Alternative IV)—serving up to 8,200 skiers at one time—as the preferred development alternative.[6]

The *Early Winters Study* made clear that a decision to go forward with a ski resort would not result immediately in development; rather, "[f]urther environmental analysis and review will be required prior to any decision by the Forest Service to allow a specific development at Early Winters, and by the responsible state and local govern-

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> That area of the Okanogan National Forest known as Sandy Butte has been excluded from wilderness designation in S. 837. * * * The designation by Congress in S. 837 makes it unnecessary to further withhold the Sandy Butte/Early Win[t]ers Alpine Winter Sports Study FEIS pending completion of the Okanogan Forest Plan. The Forest Service and the Department of Agriculture are directed to allow the evaluation process for the Sandy Butte development to proceed without additional delay * * *.

S. Rep. 98-461, 98th Cong., 2d Sess. 11 (1984). For the Court's convenience, we have lodged copies of the *Early Winters Study* with the Clerk of the Court.

[6] The alternatives ranged from denying the request to build a ski resort (Alternative I) to allowing development of a ski area capable of serving 10,500 skiers at one time (Alternative V). The *Early Winters Study* did not give detailed consideration to the expansion of existing ski areas or the development of new ski areas at other locations. The *North Cascades Study* had considered these options and had concluded that—of 23 existing and potential sites—Sandy Butte was the only site in the State of Washington suitable for new development as a major ski area. See *Early Winters Study* 6-7; see also Pet. App. 37a, 51a-52a.



ment agencies, prior to any authorization to develop non-Forest Service lands" (*Early Winters Study* 1). Following issuance of a special use permit, the developer would have to submit a detailed mountain and base development plan for the Forest Service's approval, providing the precise ski area design (*id.* at xvi). At that stage, the *Study* explained, site-specific plans to mitigate environmental impacts would be required (*id.* at xvi, 69) ("All prescribed mitigation will be accomplished through the Ski Area Master Development Plan.").

Although it was too early at this stage of the planning process to specify detailed mitigation measures, it was not too early to identify significant anticipated effects that major development might have on Sandy Butte and the surrounding communities. The *Early Winters Study* evaluated the potential impacts on air and water quality, vegetation, wildlife, fisheries, timber resources, socio-economic conditions, land use, recreation, transportation, and public services (*Early Winters Study* 65-145). In each of these areas, the *Study* considered the impacts both within and without the Okanogan National Forest. It distinguished between "primary" (or "on-site") impacts, which would occur on the specific national forest lands occupied by a ski resort, and "secondary" (or "off-site") impacts, which would occur on other adjacent lands. This distinction is significant because neither the Forest Service nor the developer can control secondary effects resulting from third-party activities on non-federal lands. The *Study* recognized that the unpredictability of off-site development patterns limited its ability to project secondary impacts, stating (*id.* at 1-3):

> Since there are no pending proposals or plans to develop off-site lands, the evaluation of off-site impacts is not site-specific. It is general in nature, acknowledging to the extent practicable the impacts associated with the growth that is likely to be induced

> by development of Sandy Butte for skiing. The evaluation of off-site impacts [is] included to provide a more complete picture of the likely effects of ski development at Early Winters and alert other jurisdictions to decisions to [be] made.

The *Early Winters Study* concluded that the proposed development would have various environmental effects—including effects related to wildlife and air quality—both on-site and off-site. The *Study* found that on-site and off-site development would affect Methow Valley's mule deer population. At Sandy Butte itself, ski runs and lifts, new roads, and other support facilities could damage the mule deer's fawning habitat (*Early Winters Study* 16, 75-76).[7] The impacts on the mule deer resulting from off-site development of adjacent lands were expected to be more serious, ranging from an 8-15 percent reduction in the deer's winter habitat (*id.* at 76).[8] Significantly, the *Study* recognized that these off-site effects would occur even if *no* ski area were built at Sandy Butte (*ibid.*).[9] The Study further noted that off-site im-

[7] Sandy Butte also is a major source of summer range for the mule deer. The *Study* predicted, however, that while the ski area would decrease the summer range by between 5 and 10 percent, the remaining summer range would be sufficient for the existing herd, even with maximum development (*Early Winters Study* 75).

[8] The Washington Department of Game estimated that the mule deer could face a 50 percent reduction in winter range (*Early Winters Study* 76). However, the state agency's representative was unable to explain how the agency had reached that assessment. See Tr. 388-390 (May 8, 1986).

[9] The *Early Winters Study* stated (at 76) that "expected winter range encroachment would noticeably reduce numbers of deer in the Methow [Valley] with any alternative." The "no action" alternative was expected to have serious impacts on the mule deer because the area was projected to sustain a significant increase in human population even if no ski development occurred at Sandy Butte (*id.* at vii, 65, 76, 104).



pacts not only were likely to be more serious than on-site impacts, they were also more difficult to predict with any precision because they depend on future actions by individuals, commercial interests, and local governments that are largely beyond the Forest Service's control.[10]

The *Early Winters Study* also addressed the proposed development's impact on air quality. It found that, while the ski resort itself "will not have a measurable effect on existing or future air quality" (*Early Winters Study* 65), the off-site effects would be substantial regardless of the size of the proposed ski resort. In particular, air quality studies showed that, even with *no* ski area development at Sandy Butte, increasing settlement of the Methow Valley—and with it, an increase in automobile, fireplace, and wood stove use—was destined to reduce air quality in the area below state standards (*id.* at 67).[11] The secondary impacts from development of nearby private land would increase with successive levels of ski area development (*id.* at 65-67).

For each area of impact, the *Early Winters Study* proposed measures to reduce or eliminate the adverse effects. The *Study* identified both "the mitigation measures the Forest Service will require as a condition of any special use permit issued for use of National Forest System lands" and "[m]itigation measures other agencies could use to deal with problems occurring on lands other than National

[10] "Off-site effects are more difficult to estimate, due to the uncertainty of where other public and private lands may become developed. In general, wildlife habitats and populations would suffer with the increased habitat loss, human activity, game harvesting, predation harassment by dogs and cats, and other encroachment" (*Early Winters Study* 76).

[11] "Without mitigation, modeled values for total suspended particulates (TSP) indicate nearly all areas of the Upper Methow Valley will experience concentrations in excess of the State standard, even with Alternative 1 [the no action alternative]" (*Early Winters Study* 67).

Forest lands" (*Early Winters Study* 14). The *Study* further explained (*id.* at 14):

> These measures are conceptual and will be made more specific as part of the design and implementation stages of the planning process. If later steps of the approv[al] process identify other environmental problems associated with development on National Forest System lands, additional mitigations may be required.

The *Early Winters Study* identified a number of methods for mitigating adverse impacts on wildlife. With respect to on-site impacts, the *Study* described how the ski area could be planned to locate runs, lifts, and roads away from water sources and fawning cover and recommended restrictions on travel and other activities in sensitive areas during the mule deer's fawning season (*Early Winters Study* 14-16). In addition, the *Study* noted that the Forest Service would further evaluate the impact of development on mule deer at the master plan review stage and propose additional mitigation measures at that time (*ibid.*). With respect to the more serious off-site impacts, the *Study* stressed the importance of zoning limitations to protect wildlife (*id.* at 77).[12] In addition, the *Study* suggested that the local governments should acquire and manage some critical parcels and obtain conservation easements for others, incorporate special design features into the roads to protect wildlife, pass ordinances to protect wildlife from dogs, and discourage development near water sources (*id.* at 77-78).[13]

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[12] "Since loss of winter range and disruption of migration routes are primary concerns which will cause declines in deer numbers, protection of vital portions [of winter range] will be assured prior to ski hill development. Rezoning is essential and will occur * * *" (*Early Winters Study* 77).

[13] In July 1985, Okanogan County entered into a memorandum of understanding with the Forest Service agreeing to institute these actions (Pet. App. 42a). The County has since passed a new zoning ordinance and a dog control ordinance.



The *Early Winters Study* recognized that all of the major air quality impacts were expected to be generated by off-site combustion of wood for space heat and motor vehicle use during the ski season and therefore suggested that local governments institute off-site mitigation measures within their jurisdiction. The *Study* suggested that Okanogan County form an Air Quality Control Authority and create an airshed management plan, which would incorporate (1) building and zoning codes to restrict the number of wood stoves and fireplaces; (2) certification requirements to control emissions from woodstoves and fireplaces; and (3) monitoring and enforcement mechanisms (*Early Winters Study* 68-69).[14]

3. The Regional Forester reviewed the *Early Winters Study* and concurred in its recommendation supporting a ski resort capable of serving 8,200 skiers. On July 5, 1984, he accordingly issued a decision to seek a qualified developer for Sandy Butte (Pet. App. 63a-71a).[15] The Regional Forester explained that the highest development alternative (serving up to 10,200 skiers at one time) "would

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[14] The Forest Service, the United States Environmental Protection Agency, the State Department of Ecology, and Okanogan County subsequently entered into a memorandum of understanding committing the county to develop and enforce an air quality ordinance and other mitigation measures necessary to maintain air quality within the standards of the state air quality implementation plan (Pet. App. 45a-46a). The Forest Service agreed, in turn, to ensure that measures sufficient to maintain air quality were in place before allowing any construction of permitted facilities at Sandy Butte (Supplemental Excerpts of Record 47-48). By September 1986, Okanogan County had adopted a strict new air quality ordinance.

[15] This decision did not identify either the developer or the exact configuration of a ski development at Sandy Butte. Instead, it established that the Forest Service would seek a qualified applicant to develop a ski area of a certain size in compliance with certain financial and environmental requirements (Pet. App. 63a-71a).

provide maximum utilization of the recreation resource opportunities and increased economic benefit to the area" (*id.* at 65a), and that the "no action" alternative "would cause the least disruption to the natural environment" (*ibid.*), but the selected alternative "provides a balance of concerns for the physical and biological components of the human environment in addition to concerns for social and economic welfare" (*ibid.*). He further observed that adverse environmental effects would result from all of the alternatives, including the "no action" option, that these adverse effects would result almost exclusively from off-site development, and that "[p]ractical measures to reduce the adverse impacts have been, or are in the process of being, implemented by Okanogan County" (*id.* at 67a).[16] The Regional Forester also proposed to investigate ways to compensate for off-site destruction of mule deer winter range through the management of the Okanogan Forest as a whole (*ibid.*).

4. On October 1, 1984, respondents Methow Valley Citizens Council, et al. (MVCC), requested, pursuant to 36 C.F.R. 211.18, that the Chief of the Forest Service reverse the Regional Forester's decision.[17] He denied that request, with an extensive discussion of the reasons supporting his decision, on December 16, 1985 (Pet. App. 49a-62a). Respondents then filed this action in the United States District Court for the District of Oregon. The complaint contended, among other claims, that the *Early Winters*

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[16] As we have noted, see notes 13-14, *supra*, these efforts included the development of various local restrictions to protect wildlife and air quality (see Pet. App. 66a-70a). The Forest Service also agreed to ensure that measures sufficient to maintain air quality were in place before allowing any construction of permitted facilities at Sandy Butte. See Supplemental Excerpts of Record 47-48.

[17] For convenience, we refer to these parties as the respondents. When referring to the developer, which is also a respondent to our petition, we shall use the abbreviation MRI.



*Study* did not conform to NEPA's requirements, that the Forest Service's decision to develop Sandy Butte was not in the public interest, and that the Forest Service had violated the National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.*, and the Clean Air Act, 42 U.S.C. 7401 *et seq.* The parties agreed to submit the issues to a United States magistrate pursuant to 28 U.S.C. 636(c).

The magistrate dismissed through summary judgment respondents' claims under the National Forest Management Act and the Clean Air Act, and after a four-day hearing to supplement the administrative record, he rejected all of respondents' remaining claims (Pet. App. 20a-48a). The magistrate concluded that the Forest Service's decision to go forward with the issuance of a special use permit was unreviewable under Ninth Circuit precedent (*id.* at 28a-30a); that even if it were reviewable, it was not arbitrary and capricious (*id.* at 30a n.4); and that it did not violate due process (*id.* at 31a). The magistrate next held that the *Early Winters Study* satisfied NEPA's requirements for an environmental impact statement (*id.* at 31a-47a). He rejected respondents' argument that the *Study's* discussion of alternative development sites was inadequate (*id.* at 34a-38a), observing that "the North Cascade Winter Sports Study, a work cited in the [*Early Winters Study*] and available to the public, had identified Sandy Butte as the only area in the Okanogan Forest having good potential as a major ski development" (*id.* at 37a), and that expansions of sites "a hundred or more miles away from the Okanogan National Forest are not reasonable alternatives" (*ibid.*). The magistrate further determined that the *Early Winters Study* adequately discussed the project's environmental impacts (*id.* at 38a-47a). He expressly approved the *Study's* discussion of impacts on mule deer (*id.* at 39a-40a) and on air quality (*id.* at 42a-45a) and specifically rejected respondents' contentions that the Forest Service was obligated to prepare a

"worst case" analysis of the possible impacts (*id.* at 40a, 45a) and that the *Study* gave insufficient analysis to possible mitigation measures (*id.* at 41a-42a, 45a-46a).

5. Respondents appealed the magistrate's decision directly to the court of appeals (see 28 U.S.C. 636(c)(3)). The court reversed the magistrate's determination, holding that the *Early Winters Study* failed to satisfy NEPA's requirements and that the Forest Service's decision to issue a special use permit was arbitrary and capricious (Pet. App. 1a-19a).

The court found the *Early Winters Study* to be flawed in three principal respects. First, the court held that the *Study* should have given detailed consideration to the possibility of expanding existing ski resorts as one of the alternative development proposals, rejecting the magistrate's determination that these were not reasonable alternatives (Pet. App. 8a-11a). Second, the court held that the statement did not provide a sufficiently detailed discussion of the environmental impacts of the proposed project on mule deer and air quality (*id.* at 11a-16a). The court specifically stated that if the government is unable to obtain adequate information on the effects of the project on mule deer, the government must conduct a "worst case" analysis of the environmental impacts (*id.* at 13a, 14a).[18] Finally, the court held that Section 102 of NEPA (42 U.S.C. 4332) "requires that 'action be taken to mitigate the adverse effects of major federal actions' " (Pet. App. 17a).[19] The court specifically ruled that an environmental impact statement must contain both a detailed plan to mitigate any adverse environmental effects and an analysis

[18] The court based this requirement on its recent decision in *Oregon Natural Resources Council* v. *Marsh*, 820 F.2d 1051, 1058-1059 (1987), cert. granted, No. 87-1704 (June 27, 1988).

[19] The court quoted *Stop H-3 Ass'n* v. *Brinegar*, 389 F. Supp. 1102, 1111 (D. Haw. 1974), rev'd on other grounds, 533 F.2d 434 (9th Cir.), cert. denied, 429 U.S. 999 (1976).



of the plan's effectiveness (*ibid.*). Having failed to include a " 'complete mitigation plan' " (*id.* at 19a (citation omitted)), the *Early Winters Study* was "inadequate as a matter of law" (*ibid.*).

With respect to the Forest Service's decision to issue a special use permit, the court acknowledged (Pet. App. 3a-4a) that its prior precedent had indicated that such decisions are not reviewable under the Administrative Procedure Act, 5 U.S.C. (& Supp. IV) 701-706. The court concluded, however, that subsequent Forest Service regulations had since created " 'law' for this court to apply" and that the decisions were therefore now reviewable (Pet. App. 4a-5a). The court then held that the relevant Forest Service regulations (36 C.F.R. 251.54(e)(4) and 36 C.F.R. 251.56(a)(1)(ii)) require "an adequate mitigation plan" (Pet. App. 5a n.3), and that the mitigation plan contained in the *Early Winters Study* was so inadequate that the "decision to grant the special use permit could be none other than arbitrary, capricious and an abuse of discretion" (*ibid.*).

## SUMMARY OF ARGUMENT

The Forest Service has fully complied with NEPA and the agency's own regulations in deciding to issue a special use permit for the proposed Early Winters Ski Area. The court of appeals erred in holding that the Forest Service's environmental impact statement, the *Early Winters Study*, was deficient and that the Forest Service's regulations prohibit the issuance of a special use permit in the absence of a fully developed plan to mitigate environmental harm.

1. NEPA directs federal agencies proposing actions that significantly affect the quality of the human environment to prepare a detailed statement on the environmental consequences of the proposed action. NEPA § 102(2), 42

U.S.C. 4332(2). See *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983). NEPA's mandate to the agencies is "essentially procedural" (*Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1978)), and the only role for the courts is to ensure that the agency has taken a "hard look" at environmental consequences. *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976). The court of appeals exceeded its proper role here. The court interpreted NEPA to create new substantive and procedural obligations, found nowhere in the statutory language or in the Council on Environmental Quality's (CEQ's) regulations implementing the Act.

a. The court of appeals erred, first, in holding that NEPA imposes a substantive obligation on agencies " 'to mitigate the adverse effects of major federal actions' " (Pet. App. 17a (citation omitted)). NEPA does not dictate what actions the agency should take in response to expected environmental consequences. As this Court has repeatedly stated, NEPA requires the agency to consider and inform the public of potential environmental impacts; it does not require the agency to " 'elevate environmental concerns over other appropriate considerations.' " *Baltimore Gas & Elec. Co.*, 462 U.S. at 97-98 (citation omitted). The court of appeals' conclusion, which respondents themselves have declined to defend (Br. in Opp. 9), is accordingly incorrect.

The court of appeals' misperception of NEPA's function led the court to misconstrue the statute's procedural requirements. The court's erroneous premise that NEPA requires federal agencies to mitigate adverse environmental effects prompted it to require that agencies include in every environmental impact statement a "complete mitigation plan" for dealing with environmental harm. No one disputes that a federal agency can and should consider



mitigation opportunities when assessing the environmental consequences of a proposed action. Indeed, the CEQ's implementing regulations direct that mitigation opportunities be considered and discussed during the preparation of an environmental impact statement. But the court's inflexible requirement that an agency must prepare a "complete mitigation plan" is foreign to NEPA and would impede the goal of sound agency decisionmaking. "NEPA does not require agencies to adopt any particular internal decisionmaking structure." *Baltimore Gas & Elec. Co.*, 462 U.S. at 100. The agency has broad discretion to determine the form and scope of the mitigation discussion in light of the particular circumstances, provided only that the environmental review as a whole satisfies NEPA's specific requirements and that the resulting decision is not arbitrary or capricious. See *id.* at 97-98, 105-106.

This case aptly illustrates why there is neither need nor warrant for courts to impose additional obligations. The Forest Service prepared the *Early Winters Study* to assist its determination whether to authorize construction of a proposed ski area whose on-the-ground dimensions and form could not be determined until later stages in the planning process. The *Early Winters Study* accordingly discussed mitigation measures at a conceptual level appropriate for that stage of decisionmaking. The Forest Service reasonably concluded, in accordance with the concept of tiered decisionmaking, that a general discussion of possible mitigation measures would sufficiently inform its inquiry whether to go forward with the project. The court of appeals' decision would forbid this manifestly sensible approach to project planning and development.

b. The court of appeals also erred in requiring the Forest Service to prepare a "worst case analysis" of environmental harm if, on remand, relevant scientific information on environmental effects is unavailable or too

costly to obtain. As we explain in somewhat greater detail in the companion case, *Marsh* v. *Oregon Natural Resources Council,* No. 87-1704, NEPA itself prescribes no particular method for dealing with uncertainty; the CEQ introduced worst case analysis as its prescribed method for addressing this problem. The CEQ's experience with worst case analysis revealed, however, that the method did not fulfill NEPA's objectives, and the agency therefore has replaced it with a more manageable methodology that identifies "reasonably foreseeable" environmental impacts. See 40 C.F.R. 1502.22. The court of appeals' conclusion that "NEPA caselaw" (Pet. App. 13a n.11) requires that agencies continue to employ worst case analysis is based upon a misreading of those cases, which merely interpreted the worst case regulation. The court of appeals clearly overstepped its authority in overruling the CEQ regulatory revision.

2. The court of appeals not only misconstrued NEPA, it also imported its incorrect view of NEPA's mitigation requirements into Forest Service regulations governing the issuance of special use permits. The regulations require that special use permits contain terms and conditions to minimize environmental damage (36 C.F.R. 251.56(a)(1)(ii)), but they do not require the sort of "complete mitigation plan" that the court of appeals contemplates. Congress placed the authority to specify conditions for ski resort special use permits in the Forest Service (16 U.S.C. 497), and that agency has never interpreted its resulting regulation to require a "complete mitigation plan." The Forest Service's interpretation of its regulation is reasonable and entitled to deference. *E.g., Lyng* v. *Payne,* 476 U.S. 926, 939 (1986).



## ARGUMENT

### I. NEPA DOES NOT REQUIRE FEDERAL AGENCIES TO INCLUDE IN THEIR ENVIRONMENTAL IMPACT STATEMENTS A COMPLETE PLAN TO MITIGATE ENVIRONMENTAL DAMAGE OR A "WORST CASE" ANALYSIS OF POTENTIAL ENVIRONMENTAL HARM

The National Environmental Policy Act of 1969 directs federal agencies proposing actions that significantly affect the quality of the human environment to prepare a detailed statement on the environmental consequences of the proposed action. NEPA § 102(2), 42 U.S.C. 4332(2). This procedural requirement serves two purposes: First, it obligates the agency to consider the environmental effects of the proposal; and second, it assures the public that the agency has considered environmental concerns in the decisionmaking process. *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.,* 462 U.S. 87, 97 (1983). The federal agencies are well versed in NEPA's requirements, they commonly utilize environmental impact statements as a central element of their planning processes, and they have prepared thousands of such statements over the past 18 years.

The court of appeals' decision in this case departs from precedent and established practice to put forward a novel interpretation of NEPA's requirements that would profoundly alter the federal agencies' compliance obligations. The court's decision would require all environmental impact statements to contain detailed and demonstrably effective plans for mitigating environmental harm and, whenever the agency lacks information or adequate scientific methodology to determine precisely a potential environmental effect, to include a "worst case" analysis. Neither NEPA, the Council on Environmental Quality's implementing regulations, nor this Court's precedents pro-

vide a basis for imposing those requirements. As we demonstrate below and in our brief in the companion case, *Marsh* v. *Oregon Natural Resources Defense Council*, No. 87-1704, the court's rigid directives are not only contrary to federal law, they would actually impede the goal of informed agency decisionmaking by preventing federal agencies from carrying out their resource management responsibilities through systematic project development.[20]

[20] The court of appeals erred in two other respects, but we have not sought this Court's review of those errors. First, the court incorrectly concluded that the *Early Winters Study's* discussion of development alternatives was inadequate (Pet. App. 8a-11a). The significance of that ruling, however, is limited to the case at hand. The court appears to have agreed that the reasonableness of the alternatives depends essentially upon the scope of the proposed action as defined by the agency (Pet. App. 9a); it simply ignored the agency's own description of the scope of its action (see pages 5-6, *supra*). The court also erred in summarily overruling the *Study's* scientific determination, affirmed by the magistrate (Pet. App. 44a-45a), that the ski area would not have a significant impact on air quality in the Pasayten Wilderness Area. See, *e.g.*, *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-575 (1985) (appellate court is obligated to give deference to the original factfinder); *Baltimore Gas & Elec. Co.*, 462 U.S. at 103 (reviewing court "must generally be at its most deferential" when reviewing scientific determinations). That narrow factual question is, however, peculiar to this case; moreover, the government is seeking reiteration of this Court's deference principles in the companion case, *Marsh* v. *Oregon Natural Resources Council*, No. 87-1704. Finally, we note that respondent is mistaken in suggesting (Br. in Opp. 22 n.16) that the government does not seek review of the court's determination that the *Study* inadequately discussed impacts on mule deer and upper Methow Valley air quality. The court's sole basis for finding those discussions inadequate was the absence of a detailed mitigation plan and a worst case analysis. See Pet. App. 12a-15a, 16a-19a. Those issues are both addressed in this brief.



### A. NEPA's Requirement That Federal Agencies Prepare A Detailed Statement on the Environmental Consequences of Major Federal Actions Does Not Impose A Substantive Obligation To Mitigate Adverse Environmental Effects Or A Procedural Obligation To Develop A "Complete Mitigation Plan"

1. This Court has clearly articulated the role that NEPA assigns to the federal agencies and the courts. Section 102(2)(C) of NEPA (42 U.S.C. 4332(2)(C)) requires federal agencies to prepare an environmental impact statement that describes " 'every significant aspect of the environmental impact of a proposed action' " and that "inform[s] the public that it has indeed considered environmental concerns in its decisionmaking process." *Baltimore Gas & Elec. Co.*, 462 U.S. at 97 (quoting *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1978)). While "NEPA does set forth significant substantive goals for the Nation, • • • its mandate to the agencies is essentially procedural." *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 558. Furthermore, "the only procedural requirements imposed by NEPA are those stated in the plain language of the Act" (*id.* at 548). "The procedural duty imposed upon agencies [by Section 102(2)(C)] is quite precise, and the role of the courts in enforcing that duty is similarly precise." *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 (1976). "The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken' " (*id.* at 410 n.21 (citation omitted)). Furthermore, the courts should defer to the judgment of the Council on Environmental Quality (CEQ)—the agency responsible for assuring proper implementation of NEPA (42 U.S.C. 4344)—which has promulgated regulations for preparing environmental impact statements. See 40 C.F.R. 1501.1 *et seq.* "CEQ's interpretation of NEPA is entitled to substan-

tial deference." *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979).

The court of appeals seriously departed from these principles. Relying solely on lower court precedent, the court of appeals concluded that NEPA requires federal agencies to assume significant new substantive and procedural obligations with respect to mitigation of environmental harm. The court based its mitigation requirement on the fundamentally mistaken premise that Section 102 of NEPA "requires that 'action be taken to mitigate the adverse effects of major federal actions' " (Pet. App. 17a, citing *Stop H-3 Ass'n* v. *Brinegar*, 389 F. Supp. 1102 (D. Haw. 1974)). Neither Section 102, nor any decision of this Court interpreting that provision, imposes any such requirement.[21] The court's reliance on *Stop H-3 Ass'n* (which was reversed on other grounds, 533 F.2d 434 (9th Cir.), cert. denied, 429 U.S. 999 (1976)) is obviously misplaced.[22]

[21] The court of appeals first suggested that proposition in *Oregon Natural Resources Council* v. *Marsh*, *supra*, based on a misconstruction of one of its prior precedents. The *Marsh* court stated that environmental impact statements must include a discussion of measures to mitigate adverse environmental consequences, adding that "[a]s long as significant measures are undertaken to mitigate the project's effects, the measures need not compensate completely for adverse environmental impacts" (820 F.2d at 1055). The court obtained the quoted language from *Friends of Endangered Species, Inc.* v. *Jantzen*, 760 F.2d 976, 987 (9th Cir. 1985). As we explain (note 26, *infra*), the *Jantzen* passage does not support the court of appeals' suggestion that environmental impact statements must always provide for some mitigation; read in context, the passage states that if an agency substantially mitigates the environmental effects of its actions, it may not need to prepare *any* environmental impact statement at all. See 760 F.2d at 987.

[22] The 1974 district court decision in *Stop H-3* states, without any citation of authority, that "NEPA *implies* a requirement that action be taken to mitigate the adverse effects of major federal actions" (389 F. Supp. at 1111 (emphasis added)). That statement was dubious authority when written; this Court's subsequent decisions demonstrate that it was quite clearly wrong.



Section 102 of NEPA, by its express terms, requires federal agencies to prepare a "detailed statement" of a proposed project's environmental consequences, including "adverse environmental effects which cannot be avoided," "alternatives to the proposed action," the relationship between "local short-term uses" and "long-term productivity," and "any irreversible and irretrievable commitments of resources" (42 U.S.C. 4332). Section 102 thus assures that all federal agencies will take environmental concerns into account in their decisionmaking processes. See *Weinberger* v. *Catholic Action*, 454 U.S. 139, 143 (1981); *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980); *Andrus* v. *Sierra Club*, 442 U.S. 347, 350-351 (1979). See also 40 C.F.R. 1501.1. But Section 102 does not dictate what actions the agency should take in response to expected environmental consequences; indeed, "the Act mandates no particular substantive outcomes" (*City of New York* v. *United States Dep't of Transportation*, 715 F.2d 732, 748 (2d Cir. 1983), cert. denied, 465 U.S. 1055 (1984)). Instead, NEPA leaves substantive decisions to the agency. As this Court has repeatedly emphasized, NEPA requires the agency to consider and inform the public of potential environmental impacts; it does not require the agency to " 'elevate environmental concerns over other appropriate considerations.' " *Baltimore Gas & Elec. Co.*, 462 U.S. at 97-98 (quoting *Strycker's Bay Neighborhood Council, Inc.*, 444 U.S. at 227). Accord *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 558; *Kleppe* v. *Sierra Club*, 427 U.S. at 410 n.21. The court of appeals' conclusion that NEPA "requires that 'action be taken to mitigate the adverse effects of major federal actions' " is thus patently incorrect. Indeed, even respondents decline to defend the court's proposition; they contend that they "never have asserted that

NEPA imposes a substantive duty to mitigate" (Br. in Opp. 9).[23]

2. The court of appeals' misperception of NEPA's function has led the court to misconstrue the statute's formal requirements. The court's erroneous premise that NEPA requires federal agencies to mitigate adverse environmental effects prompted it to construct a rigid and unwarranted procedural regime for developing mitigation measures. The court concluded that whenever a federal agency prepares an environmental impact statement, it must include "a thorough discussion of measures to mitigate the adverse environmental impacts of a proposed action" and " 'must analyze the mitigation measures in detail and explain the effectiveness of the measures' " (Pet. App. 17a (quoting *Oregon Natural Resources Council* v. *Marsh*, 820 F.2d at 1055)). The court specifically stated:

> The importance of the mitigation plan cannot be overestimated. It is a determinative factor in evaluating the adequacy of an environmental impact statement. Without a complete mitigation plan, the decisionmaker is unable to make an informed judgment as to the environmental impact of the project—one of the main purposes of an environmental impact statement.

Pet. App. 19a (quoting *Oregon Natural Resources Council* v. *Marsh*, 820 F.2d at 1055). The court of appeals' inflexible new procedural requirements are foreign to NEPA and would ultimately impede the goal of sound agency decisionmaking.

No one questions that a federal agency can and should consider mitigation opportunities when assessing the environmental consequences of a proposed action. The crucial issue here is the role that mitigation considerations play in the agency's environmental review. The court of appeals concluded that NEPA requires mitigation and that the government must therefore develop a "complete mitigation plan" as an essential element of an environmental impact statement (Pet. App. 17a, 19a). The government urges a fundamentally different proposition: NEPA requires environmental analysis and disclosure, and the government must therefore discuss mitigation in a manner that aids reasoned decisionmaking. See 40 C.F.R. 1502.1. "As *Vermont Yankee* made clear, NEPA does not require agencies to adopt any particular internal decisionmaking structure." *Baltimore Gas & Elec. Co.*, 462 U.S. at 100. The agency has broad discretion to determine the form and scope of the mitigation discussion in light of the particular circumstances, subject only to the requirements that the environmental review as a whole satisfies NEPA's specific requirements and that the resulting decision is not arbitrary or capricious. See *Baltimore Gas & Elec. Co.*, 462 U.S. at 97-98, 105-106.

The need for this flexibility becomes obvious when one considers the broad variety of contexts in which mitigation considerations may become relevant. The federal agencies

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[23] When Congress has wished to impose substantive environmental protection obligations on federal agencies, it has done so explicitly. For example, Congress specified in the Endangered Species Act of 1973 (ESA), Pub. L. No. 93-205, 87 Stat. 884, that federal agencies shall "insure that any action authorized, funded, or carried out * * * is not likely to jeopardize the continued existence of any endangered species" (16 U.S.C. 1536(a)(2)). See *Roosevelt Campobello Int'l Park* v. *EPA*, 684 F.2d 1041, 1049 (1st Cir. 1982). Similarly, Congress specified in Section 4(f) of the Department of Transportation Act of 1966, Pub. L. No. 89-670, 80 Stat. 934, that the Secretary of Transportation may approve a transportation project requiring use of a public park, recreation area, wildlife refuge, or historic site only if "there is no prudent and feasible alternative to using that land; and * * * the program or project includes all possible planning to minimize harm to the [land]" (49 U.S.C. 303). These statutes, which were enacted in the same general time frame as NEPA, demonstrate that when Congress wishes to impose substantive mitigation obligations, it does so expressly. The court of appeals' effort to write such a duty into NEPA would usurp Congress's deliberate contrary choice.

must prepare an environmental impact statement (or explain why a statement is not necessary) for the full gamut of government activities, ranging from proposals for legislation, to physical construction and improvements, to the issuance of permits.[24] In addition, federal agencies frequently find it necessary or desirable to provide a series of such statements at various stages of a single project's development.[25] The relevance of and opportunities for mitigation vary considerably depending on the nature and complexity of the activity and the stage at which the environmental impact statement is being prepared. It would not be feasible, and often would be counterproductive, to develop a "complete mitigation plan" in every circumstance.

For example, a federal agency considering whether to initiate an extensive new resource development program—such as a coal leasing program—will generally prepare a programmatic environmental impact statement at the conceptual stage of consideration. See 40 C.F.R. 1501.4, 1502.4(b). See, *e.g.*, *Kleppe* v. *Sierra Club*, 427

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[24] See, *e.g.*, *Scientists' Inst. for Pub. Information, Inc.* v. *AEC*, 481 F.2d 1079, 1092 (D.C. Cir. 1973) ("NEPA statements can and do vary, from relatively short and simple analyses of the environmental effects of smaller projects to complex multi-volume works for projects of multi-billion-dollar dimensions.").

[25] The CEQ has encouraged agencies to utilize the practice of "tiering" environmental impact statements. See 40 C.F.R. 1502.20, 1508.28. Tiering is simply a method of implementing the familiar and sensible concept of staged project development. See, *e.g.*, D. Dannenbring & M. Starr, *Management Science: An Introduction* 548 (1981) ("A project is itself a combination of many varied and complex tasks or activities. These tasks are interdependent in that most cannot begin until some other task has been completed."). Tiering "is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe" (40 C.F.R. 1508.28).



U.S. at 400. The agency cannot be expected, however, to prepare a "complete mitigation plan" at that preliminary point of the decisionmaking process. As a contrasting example, an agency considering whether to undertake a discrete project that has particular features designed to eliminate environmental harm need not prepare an environmental impact statement if it determines, as a result of an environmental assessment, that there will be no significant environmental impact. See 40 C.F.R. 1501.4, 1508.9, 1508.13. See, *e.g.*, *Friends of Endangered Species, Inc.* v. *Jantzen*, 760 F.2d 976, 987 (9th Cir. 1985). An agency making that determination can reasonably be expected to have a detailed statement of the mitigation measures in hand if it relies on those measures in reaching its decision.[26]

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[26] Prior to the Ninth Circuit's decisions here and in *Marsh*, legal challenges involving an agency's discussion of mitigation measures typically arose out of the agency's determination that mitigation measures obviated the need for an environmental impact statement. In response, the courts consistently recognized that a "Finding of No Significant Impact" (40 C.F.R. 1508.13), is appropriate if otherwise significant environmental effects will be remedied by mitigation measures built into the project. See *Friends of Endangered Species, Inc.* v. *Jantzen*, 760 F.2d at 987; *Louisiana* v. *Lee*, 758 F.2d 1081, 1083 (5th Cir. 1985), cert. denied, 475 U.S. 1044 (1986); *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears* v. *Peterson*, 685 F.2d 678, 681-684 (D.C. Cir. 1982); *Preservation Coalition, Inc.* v. *Pierce*, 667 F.2d 851, 860-861 (9th Cir. 1982); *City & County of San Francisco* v. *United States*, 615 F.2d 498, 501 (9th Cir. 1980); *Maryland-National Capital Park & Planning Comm'n* v. *U.S. Postal Service*, 487 F.2d 1029, 1039 (D.C. Cir. 1973). See also 46 Fed. Reg. 18,026 (1981). The Ninth Circuit specifically stated in this context that "so long as significant measures are undertaken to 'mitigate the project's effects,' they need not *completely compensate* for adverse environmental impacts." *Friends of Endangered Species, Inc.* v. *Jantzen*, 760 F.2d at 987 (emphasis in original; citation omitted). The court of appeals' *Marsh* decision mistakenly cited *Jantzen* for the radically different proposition that an environmental impact state-

Obviously, the agency's obligation to discuss mitigation measures will depend on the nature of the proposed agency action. The CEQ's implementing regulations, which are binding on all federal agencies (Exec. Order No. 11,991, 3 C.F.R. 123, 124 (1978)), therefore provide a flexible approach to the consideration and discussion of such measures. The regulations, which broadly define the term "mitigation" to include virtually any technique that avoids, eliminates, ameliorates, or compensates for environmental harm (40 C.F.R. 1508.2),[27] require a federal agency to consider mitigation opportunities at three stages of the NEPA review process.

First, the CEQ regulations direct that when a federal agency takes the initial step of defining the "scope" of an environmental impact statement, it should consider the adoption of mitigation measures, not already included in the proposed action, as one type of alternative to the proposed action. See 40 C.F.R. 1508.25.[28] This provision thus

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ment must always provide for *some* mitigation of environmental harm. See *Oregon Natural Resources Council* v. *Marsh*, 820 F.2d at 1055. See note 21, *supra*.

[27] The CEQ regulations state that mitigation includes (40 C.F.R. 1508.20):

> (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
>
> (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
>
> (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
>
> (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
>
> (e) Compensating for the impact by replacing or providing substitute resources or environments.

[28] Once an agency decides that it will prepare an environmental impact statement, it commences "an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action" (40 C.F.R. 1501.7).



assures that when an agency determines the relevant range of alternatives, it will consider, in addition to the "[n]o action alternative" and "[o]ther reasonable courses of actions" (40 C.F.R. 1508.25(b)), the possibility of modifying the proposal to reduce or eliminate environmental harm.

Second, the CEQ regulations direct that once the agency has defined the scope of its environmental review, it should address mitigation in the body of the environmental impact statement when discussing proposal alternatives and environmental consequences. See 40 C.F.R. 1502.14, 1502.16. These provisions, which instruct the agency to consider "appropriate mitigation measures not already included in the proposed action or alternatives" (40 C.F.R. 1502.14(f)) thus encourage the agency to consider mitigation opportunities that were not identified in the scoping process.

Third, the CEQ regulations state that if, upon completion of the environmental analysis, the agency chooses to go forward with the proposal, it must indicate in its record of decision "whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not." 40 C.F.R. 1505.2(c). The record of decision must also summarize a monitoring and enforcement program "where applicable for any mitigation" (40 C.F.R. 1505.2(c)), and the agency must confirm that the mitigation measures are ultimately implemented (40 C.F.R. 1505.3). These provisions ensure that the agency will consider mitigation opportunities in making its decision and will institute any measures that are chosen.

The CEQ's regulations are "designed to make the environmental impact statement process more useful to decisionmakers and the public; and to reduce paperwork and

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The "scope" of an environmental impact statement "consists of the range of actions, alternatives, and impacts to be considered" in the document (40 C.F.R. 1508.25).

the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives" (Exec. Order No. 11,991, 3 C.F.R. 123 (1978)). They permit a federal agency to consider mitigation opportunities in a systematic fashion and in accordance with NEPA's statutory framework. The regulations neither broaden nor restrict the scope of the inquiry that NEPA mandates; instead, they provide a blueprint for compliance.[29] Furthermore, they preserve the agency's basic discretion under NEPA to determine in any particular case how far-ranging, thorough, or detailed the mitigation discussion should be.[30] The CEQ regulations, which have the characteristic NEPA hallmark of adaptability, can be employed throughout the entire spectrum of agency decisionmaking. Furthermore, they ensure that an agency can target its discussion of mitigation to the particular decision at hand.

Given NEPA's "quite precise" procedural instructions (*Kleppe*, 427 U.S. at 406) and the CEQ's carefully crafted implementing regulations, there is no need or warrant for courts to impose additional compliance procedures. The court of appeals' rigid new requirement that all environmental impact statements must contain a "complete

[29] Thus, the CEQ regulations require the agency to consider mitigation measures with reference to NEPA's specific criteria, including the environmental impact of the proposed action; the adverse environmental impacts that cannot be avoided; and alternatives to the proposed actions. See 42 U.S.C. 4332(2)(C).

[30] NEPA requires a "detailed statement" of environmental consequences, but it does not require that every subsidiary matter (such as mitigation) be discussed comprehensively, nor does it require—explicitly or implicitly—a detailed discussion of mitigation. Obviously, an agency's discussion of the five subjects identified in NEPA can be "detailed" even if the discussion of their subsidiary components, viewed individually, contains varying levels of detail.



mitigation plan" not only exceeds the court's proper role (see, *e.g.*, *id.* at 410 n.21), it is both unworkable and unnecessary. As this case aptly demonstrates, that judicially coined requirement seriously impedes the NEPA review process with no corresponding benefits.

3. The Forest Service conscientiously complied with NEPA and the CEQ regulations in preparing the *Early Winters Study* and, specifically, in discussing mitigation measures. As a result of preliminary scoping, the Forest Service elected to employ a "tiered" environmental analysis in this case. See note 25, *supra*. Thus, as its preface explains, the *Study*'s inquiry was directed solely to the general question "whether National Forest System lands should be used for [a ski resort at Sandy Butte] and, if so, at what level" (*Early Winters Study* xvi). The Early Winters proposal, at this stage, was a concept whose on-the-ground dimensions and form had not yet been determined. The *Study* discussed mitigation measures at a conceptual level appropriate for that stage of decisionmaking.

The Forest Service chose a manifestly prudent approach. It would be impractical (if not impossible) to develop detailed mitigation plans prior to the determination of the ski area master plan; furthermore, it would be a potentially wasteful expenditure of time and money to develop detailed mitigation plans before the Forest Service determined whether *any* project would be allowed. The Forest Service reasonably concluded, in accordance with the concept of tiered decisionmaking, that the detailed mitigation measures were not yet ripe for specification, and a general discussion of possible mitigation measures would sufficiently inform its inquiry whether to go forward with the project. Again, NEPA and the implementing regulations require only that opportunities for mitigation be discussed.[31]

[31] The CEQ regulations expressly sanction the Forest Service's ap-

The *Early Winters Study*'s discussion of mitigation measures was general in content, but it was extensive in scope and did fully discuss opportunities for mitigation at this stage of the decisionmaking process. The *Study* identified a broad range of mitigation measures and divided them into two categories: on-site measures, which the Forest Service would make either a condition of the special use permit or a condition of approval of the master plan; and off-site measures, which the Forest Service proposed but which would require the cooperation of state and local government.[32] The *Study* explained that specific measures to mitigate wildlife impacts on-site would have to await review of the detailed master plan (*Early Winters Study* 16, 77), but some of the measures that would be considered included:

> (1) locating runs, lifts, roads, and other facilities to minimize disturbance of wildlife wintering areas.
>
> (2) leaving dead and defective trees standing in timbered areas where skier safety can be protected.
>
> (3) restricting activity on selected roads during mule deer fawning season (June).
>
> (4) locating new service roads away from water sources and fawning cover.

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proach. The pertinent regulation states in part (40 C.F.R. 1508.28):

> Tiering is appropriate when the sequence of statements or analyses is: * * * (b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation).

[32] The Forest Service also made clear that further on-site mitigation measures would be imposed later in the planning process, if the need for additional measures became apparent (*Early Winters Study* 14). As to off-site mitigation, the Forest Service was aware that development and enforcement would be largely outside its control (*id.* at 1-3).



> (5) evaluating impact to mule deer migration routes in review of the master plan.
>
> (6) designing nearby and off-site timber sales to retain adequate travel corridors, foraging, roosting, and nesting sites for spotted owls.
>
> (7) protecting other likely migration routes between summer and winter habitats for spotted owls and restricting other activities within the spotted owls' home range.
>
> (8) protecting springs and riparian areas within the permit zone.

See *Early Winters Study* 16-17. Off-site measures could include:

> (1) limiting development on deer winter range and along migration routes through rezoning options, tax incentives, and other means. In this regard, the *Study* emphasized that protection of vital portions would be assured prior to ski hill development.
>
> (2) encouraging conservation easements between private individuals and trust agencies through use of tax incentives.
>
> (3) acquiring essential tracts for migrating deer, to be administered by a wildlife management agency (*e.g.*, Washington Department of Game).
>
> (4) minimizing road kills of deer and other wildlife through use of warning signs, speed limits, and roadway design.
>
> (5) enacting dog control ordinances.
>
> (6) zoning to discourage development in riparian areas.

See *Early Winters Study* 77-78. Both on-site and off-site measures would be formulated in conjunction with the Washington Department of Game.

The *Early Winters Study*'s proposed measures for mitigating the relatively minor on-site air quality impacts included prompt revegetation of disturbed areas, mandatory application of dust control measures, and compliance with established federal and state smoke management practices (*Early Winters Study* 69). Proposals to mitigate the more serious off-site air quality impacts included:

> (1) forming an Air Quality Control Authority or similar administrative structure pursuant to Washington law;
>
> (2) developing an airshed management plan resulting in air quality standards *stricter* than existing state standards. As part of the plan's development, the following measures would be considered:
>
> —developing land use codes addressing site development and project design directed at energy efficiency and air pollution control.
>
> —requiring all new construction to be fully weatherized to reduce the need for supplemental heating sources (especially wood) beyond the central facility's heating needs.
>
> —restricting the number of fireplaces and wood stoves. In particular, few fireplaces should be allowed in tourist accommodations.
>
> —encouraging the use of alternative, non-polluting energy sources.
>
> —establishing certification mechanisms for wood stoves and fireplace inserts.
>
> —developing air pollution monitoring to alert local residents to imminent pollution episodes and to record long term changes in air quality levels. The long term data would be used to evaluate the success or failure of the mitigation measures and to impose more stringent measures if standards are violated.
>
> —developing enforcement measures to assure compliance with standards.



See *Early Winters Study* 68-69. The *Study* also suggested other mitigation measures addressed to construction and operation, water quality, soils, fisheries, cultural and visual resources, and other effects (*id.* at 14-17, 69-78, 101-136).

Thus, it is unquestionable that significant portions of the *Early Winters Study* were devoted to discussing mitigation measures. This compendious discussion was sufficiently thorough for the decision at hand: namely, whether to allow a prescribed level of ski area development at Sandy Butte. The Chief of the Forest Service and the magistrate, who served as the factfinder in this dispute, both agreed that the *Study*'s mitigation discussion satisfied NEPA's requirements (Pet. App. 41a-42a, 45a-46a, 58a-59a). The *Study* placed primary emphasis on identification of unmitigated environmental impacts because those impacts defined the potential seriousness of the environmental harm that could be encountered and thus were highly relevant to the decision whether any development should be allowed. The Forest Service reasonably determined that an in-depth discussion of mitigation measures (which could only diminish the seriousness of the unattenuated environmental impacts) played a less significant role at this stage of the decisionmaking process, particularly since the details of those measures could not be specified in the absence of state and local government cooperation and the formulation of a master development plan (*Early Winters Study* 14; Pet. App. 58a-59a; see also *id.* at 41a-42a, 45a-46a).[11]

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[11] That judgment is consistent with the view, expressed by the Ninth Circuit as well as other courts, that the planning process is an ongoing

The Forest Service's decision to provide a general, rather than a detailed, discussion of mitigation measures simply puts into practice the incontestible principle, recognized in *Vermont Yankee Nuclear Power Corp.*, that the level of detail an agency employs in its environmental discussions must be determined in light of "feasibility" and "[c]ommon sense" (435 U.S. at 551). Indeed, the lower courts have specifically held that where mitigation details are contingent on presently unknown factors, it is appropriate for an agency to limit its discussion accordingly. See, *e.g.*, *Concerned Citizens on I-190* v. *Secretary of Transportation*, 641 F.2d 1, 5-6 (1st Cir. 1981). Even if there were any doubt on that score, the Forest Service's expert judgment, which is based on extensive project planning experience, would be entitled to substantial deference.[34]

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endeavor and that agencies should be encouraged to develop and institute mitigation measures as the project develops, even *after* the environmental analysis is complete. See *Village of False Pass* v. *Clark*, 733 F.2d 605, 616 (9th Cir. 1984); *Township of Springfield* v. *Lewis*, 702 F.2d 426, 437-438 (3d Cir. 1983); *National Indian Youth Council* v. *Watt*, 664 F.2d 220, 225 (10th Cir. 1981); *Concerned Citizens on I-190* v. *Secretary of Transportation*, 641 F.2d 1, 6 (1st Cir. 1981). See also *County of Suffolk* v. *Secretary of the Interior*, 562 F.2d 1368, 1378 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978). In *Township of Springfield*, for example, the court of appeals determined that mitigation measures added to a project after circulation of the final environmental impact statement do not trigger a requirement to supplement the statement, in part because the measures were a specification of general measures spelled out in that statement. In fact, the Third Circuit noted that " 'the responsiveness to environmental concerns demonstrated by these changes reflects a commendable effort to comply with the spirit of NEPA.' " 702 F.2d at 438 (citations omitted).

[34] This obviously is not a case, like *Jantzen* (see note 26, *supra*), where the planned implementation of mitigation measures eliminated the need for an environmental impact statement. And contrary to respondents' suggestion (Br. in Opp. 3, 18, 19), the *Early Winters Study* did not "rely upon" or "assume" mitigation in discussing



The court of appeals, therefore, erred in concluding that the *Early Winters Study* failed to address mitigation adequately. Moreover, the court's blanket requirement that agencies prepare a "complete mitigation plan" is both unworkable and unwise. The court's requirement pervasively conflicts with CEQ regulations[35] and would expunge from NEPA the flexibility that allows vastly different federal agencies to perform meaningful environmental analyses tailored to their functions and needs. Agencies would no longer be able to plan and implement their activities

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adverse environmental effects. Rather, the *Study* provided a detailed discussion of the project's significant environmental effects without mitigation and then identified mitigation measures that, by definition, could be expected to reduce those impacts. See *Early Winters Study* 65-144. The *Study's* qualitative statements that implementation of mitigation measures would reduce adverse impacts (see *Early Winters Study* 67, 76, 77, 78, 145) are adequately supported and are certainly reasonable. Furthermore, the Forest Service did not "rel[y] upon potential mitigation measures to conclude that a project's ultimate impacts are acceptable" (Br. in Opp. 18). The Forest Service's record of decision recognized that adverse effects would occur with any of the proposed alternatives and specified that mitigation measures would be implemented to reduce those impacts (Pet. App. 67a; see also *id.* at 58a-59a). Thus, the Forest Service imposed mitigation measures as part of its decision, but it did not conclude that absent the success of those measures, the project would be environmentally unacceptable. Nor would any policy reflected in NEPA be served by inhibiting an agency from adopting mitigation measures designed to enhance the environment beyond the level that the agency would find minimally acceptable.

[35] See, *e.g.*, 40 C.F.R. 1501.2, 1502.5(b) (mandating early application of NEPA); 40 C.F.R. 1502.2(a)-(c) (requiring that environmental impact statements be analytic rather than encyclopedic, that impacts be discussed in proportion to their significance, and that statements be concise and "no longer than absolutely necessary to comply with NEPA and with these regulations"); 40 C.F.R. 1502.2(f) (forbidding agencies from committing resources in a manner that will bias the agency's ultimate decision); 40 C.F.R. 1502.20 (encouraging tiered environmental analysis).

through staged project development (see note 25, *supra*). As this case demonstrates, an agency cannot develop a "complete mitigation plan" at the preliminary stages of the decisionmaking process. The court's requirement would accordingly have the perverse effects of (1) encouraging agencies either to invest large sums of money and time before making even preliminary decisions or to defer environmental analysis until far along in the planning process; and (2) discouraging agencies from identifying mitigation measures that may be possible but cannot be guaranteed.[36] As a result, the court's decision would reduce, rather than enhance, the agency's ability to conduct informed and well-reasoned decisionmaking. And the courts themselves would be forced to expend considerable energy adjudicating the ultimately discretion-laden question whether a "complete mitigation plan" is sufficiently detailed to qualify as "complete."

This Court has repeatedly emphasized that the courts have a limited role to play under NEPA. *E.g., Baltimore Gas & Elec. Co.*, 462 U.S. at 97-98. The court of appeals here has not only overturned the magistrate's manifestly correct decision, it has rewritten NEPA to suit its own vision of environmental policy. The court has clearly overstepped its proper bounds.

### B. NEPA Does Not Require Federal Agencies To Prepare A "Worst Case" Analysis Of Potential Environmental Harm If Relevant Information Concerning Significant Environmental Effects is Unavailable Or Too Costly To Obtain

1. The court of appeals also erred in concluding (Pet. App. 13a-14a) that NEPA requires the Forest Service to

[36] Notably, if environmental analyses were deferred to satisfy the requirements of this decision, the agencies would run the serious risk of having projects enjoined on the ground that irretrievable commitments have been made without the requisite environmental analysis.



conduct a "worst case" analysis on remand if relevant scientific information on environmental effects is unavailable or too costly to obtain. As we explain below, and in somewhat greater detail in our brief in *Marsh* v. *Oregon Natural Resources Council, supra,* NEPA itself prescribes no particular method for dealing with the problem of scientific uncertainty; instead, the CEQ introduced worst case analysis as a method for addressing that problem. The CEQ's experience with worst case analysis ultimately revealed that the method did not effectively fulfill NEPA's objectives, and the agency therefore has replaced it with a more manageable methodology that identifies "reasonably foreseeable" environmental impacts. The court of appeals nevertheless insisted that "NEPA caselaw" (Pet. App. 13a n.11) requires that agencies continue to employ worst case analysis. That conclusion is fatally infirm; worst case analysis is a product of the CEQ regulations only, and the case law on that subject merely interprets those regulations. Accord Note, *Federal Agency Treatment of Uncertainty in Environmental Impact Statements Under the CEQ's Amended NEPA Regulation § 1502.22: Worst Case Analysis or Risk Threshold?*, 86 Mich. L. Rev. 777, 819-820 (1988).

The CEQ originated the concept of worst case analysis in its 1978 implementing regulations. See 43 Fed. Reg. 55,978, 55,997. Those regulations, which were promulgated pursuant to presidential order, represented the CEQ's first attempt to provide an authoritative blueprint for NEPA compliance that would be binding on every federal agency. See *id.* at 55,978. Section 1502.22, which came to be known as the worst case requirement, described the government's obligation to obtain information relevant to a proposed action's significant adverse environmental effects. See 40 C.F.R. 1502.22 (1985).[37]

[37] This regulation, which remained unchanged from 1978 to 1985, is reproduced in full in Addendum A, pages 2a-3a, *infra*.

Under that section, the agency was required, if possible, to obtain the information and to include it in the environmental impact statement (40 C.F.R. 1502.22(a) (1985)). If the information were unavailable or too costly to obtain, the agency was required to "weigh the need for the action against the risk and severity of possible adverse impacts" and to provide a "worst case analysis and an indication of the probability or improbability of its occurrence" (40 C.F.R. 1502.22(b) (1985)).

The CEQ did not explain why it chose worst case analysis over other methods for dealing with uncertainty (see 43 Fed. Reg. 55,984 (1978)), and the regulation itself did not explain how an agency was to go about conducting a worst case analysis. As a result, federal agencies encountered substantial difficulties in implementing the worst case requirement. See, *e.g.*, Note, *supra*, 86 Mich. L. Rev. at 798-799 n.106. Meanwhile, the courts' interpretation of the worst case regulation, accompanied by judicial second-guessing of the agencies' scientific determinations, rendered the method largely unworkable. The courts repeatedly overturned agency worst case analyses and instructed the agency to evaluate rigorously a broad spectrum of highly remote possibilities, declaring "the specific worst case to be examined by the agency on remand, including the particular scientific models and studies to be applied and the research to be performed" (*id.* at 808). See, *e.g.*, *Save Our Ecosystems* v. *Clark*, 747 F.2d 1240, 1244-1246 (9th Cir. 1984); *Southern Oregon Citizens Against Toxic Sprays, Inc.* v. *Clark (SOCATS)*, 720 F.2d 1475, 1479 (9th Cir. 1983), cert. denied, 469 U.S. 1028 (1984) (White and O'Connor, JJ., dissenting); *Sierra Club* v. *Sigler*, 695 F.2d 957 (5th Cir. 1983). See generally Note, *supra*, 86 Mich. L. Rev. at 798-804.

In 1986, following this Court's denial of the government's petition for a writ of certiorari in *SOCATS*, the CEQ replaced the worst case regulation with a new regulation that, in that agency's judgment, provides "a wiser and more manageable approach to the evaluation of reasonably foreseeable significant adverse impacts in the face of incomplete or unavailable information in an EIS." 51 Fed. Reg. 15,620 (1986).[38] The new regulation states that if "incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement" (40 C.F.R. 1502.22(a)). If information relevant to reasonably foreseeable significant adverse impacts cannot be obtained, the agency must include four items in the environmental impact statement: (1) a statement that the information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating impacts; (3) a summary of existing credible scientific evidence relevant to evaluating impacts; and (4) the agencies' evaluation of the impacts based upon theoretical approaches or research methods generally accepted in the scientific community (40 C.F.R. 1502.22(b)).[39]



The revised regulation accordingly requires "federal agencies to evaluate the reasonably foreseeable significant adverse impacts of an action, even in the face of unavailable or incomplete information" (51 Fed. Reg. 15,621 (1986)). It "specifies that the evaluation must be carefully conducted, based upon credible scientific evidence, and must consider those reasonably foreseeable significant adverse impacts which are based on scientific evidence"

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[38] Our brief in *Marsh* (87-1704 Gov't Br. 27-31) describes in detail the genesis of CEQ's decision to revise the regulation. The regulation itself is reproduced in Addendum A, pages 1a-2a, *infra*.

[39] "Reasonably foreseeable impacts" are expressly defined to include "impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason" (40 C.F.R. 1502.22(b)).

(*ibid.*). In short, the amended regulation "retains the duty to describe the consequences of a remote, but potentially severe impact, but grounds the duty in evaluation of scientific opinion rather than in the framework of a 'conjectural "worst case analysis." ' " 50 Fed. Reg. 32,237 (1985).

2. The court of appeals refused to give effect to the CEQ's carefully deliberated regulatory revision, holding here and in *Marsh* that NEPA requires worst case analysis irrespective of the CEQ regulations. See Pet. App. 12a-13a & n.11. The court incorrectly reasoned that the CEQ's "rescission * * * does not nullify the [worst case] requirement, *Marsh*, 820 F.2d at 1058 n.8, since the regulation was merely a codification of prior NEPA caselaw" (Pet. App. 13a n.11). In support of that assertion, the court of appeals summarily cited its previous decisions in *Save Our Ecosystems* and *SOCATS*. But *Save Our Ecosystems* simply cites *SOCATS* for that proposition. See 747 F.2d at 1244. *SOCATS*, in turn, simply cites *Sierra Club* v. *Sigler*, 695 F.2d at 971. There the trail ends. Neither *Sigler* nor any previous case holds that NEPA requires the federal agencies to conduct a worst case analysis.

The question in *Sigler* was whether the Army Corps of Engineers was required to comply with the CEQ's worst case analysis regulation under the particular facts of that case. The Fifth Circuit first observed that while there "is some language in NEPA which may be said to endorse generally the concept of a worst case analysis" the statute's "literal language does not require a worst case analysis" (695 F.2d at 969). The court next noted that NEPA does contemplate that agencies would engage in " '[r]easonable forecasting and speculation' " concerning future environmental effects, including the "probabilities of the occurrence" and the " 'cost of uncertainty – i.e., the costs of proceeding without more and better information' " (*id.* at



970).[40] The court then stated that the "CEQ's worst case analysis merely codifies these judicially created principles" (*id.* at 971).

Thus, the Fifth Circuit concluded that the worst case regulation was the CEQ's mechanism for implementing certain judicially recognized NEPA objectives. The court did not hold that the worst case methodology was the *only* allowable mechanism for effecting those general goals. Accord Note, *supra*, 86 Mich. L. Rev. at 797-798; see also *id.* at 798 n.105, 801-802 & nn.120-121, 812-814, 819-820. Indeed, the court of appeals' conclusion here that NEPA requires a worst case analysis is inconsistent with that court's own prior case law, which recognizes that "[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences is all that is required by an EIS." *Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974).[41]

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[40] The court specifically cited *Scientists' Inst. for Pub. Information, Inc.* v. *AEC*, 481 F.2d 1079, 1092 (D.C. Cir. 1973); *Carolina Envtl. Study Group* v. *United States*, 510 F.2d 796, 799 (D.C. Cir. 1975); and *Alaska* v. *Andrus*, 580 F.2d 465, 473-474 (D.C. Cir. 1978), vacated on other grounds, 439 U.S. 922 (1978).

[41] The CEQ was well aware of the case law concerning the "worst case" requirement when it promulgated the new regulation. The CEQ specifically considered whether those cases mandated worst case analysis and concluded that they did not (51 Fed. Reg. 15,625 (1986)):

> Comment: Case law required worst case analysis prior to adoption of [the worst case regulation].
>
> Response: This assertion is incorrect. Case law prior to the adoption of 40 CFR 1502.22 *did* require agencies to make a "good faith effort * * * to describe the reasonably foreseeable environmental impact(s)" of the proposal and alternatives to the proposal in the face of incomplete or unavailable information, consistent with the "rule of reason" [citation omitted]. The "worst case analysis" requirement was a technique adopted by CEQ as a means of achieving the goals enunciated in such case law. The "worst case" requirement itself, however, was clearly a "major innovation." * * * The U.S. Court of Appeals for the Fifth Circuit,

The CEQ has adhered to the objectives identified in *Sigler*, but has determined that "the 'worst case analysis' requirement is an unproductive and ineffective method of achieving those goals" (51 Fed. Reg. 15,618, 15,620 (1986)). The CEQ has therefore adopted "a wiser and more manageable approach to the evaluation of reasonably foreseeable significant adverse impacts in the face of incomplete or unavailable information" (*id.* at 15,620). The court of appeals' decision in this case effectively rescinds the CEQ's new regulation and, contrary to that court's own decision in *Trout Unlimited*, installs worst case analysis as a permanent feature of NEPA compliance.

This aspect of the court of appeals' decision is obviously contrary to this Court's holding that the CEQ's judgment is entitled to substantial deference, even when the agency alters its procedures for NEPA compliance. *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979). See also, *e.g.*, *American Trucking Ass'ns* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967); *Sierra Club* v. *Sigler*, 695 F.2d 957, 967, 972 (5th Cir. 1983) (recognizing that NEPA requires adherence to CEQ regulations, even when CEQ changes its interpretation, and that CEQ regulations are entitled to

interpreting the "worst case analysis" requirement for the first time in a litigation context, recognized that it was an innovation of CEQ. *Sierra Club* v. *Sigler*, 695 F.2d 957, 972 (5th Cir. 1983). CEQ has since observed difficulties with the technique of "worst case analysis" and is replacing it with a better approach to the problem of incomplete or unavailable information.

A number of commenters requested CEQ to state that the new regulation is "intended to repudiate and overrule the Ninth Circuit decisions on worst case analysis" (51 Fed. Reg. 15,625 (1986)). The CEQ recognized that its new regulation did not "overrule" judicial interpretations of the worst case requirement; instead, it simply rendered them irrelevant. The agency accordingly responded that "[t]he Ninth Circuit opinions are based on the requirements of former § 1502.22, or agency reflections thereof, and are inapplicable to this revision" (*ibid.*).



substantial deference).[42] And, as is true of its novel mitigation requirements, the court of appeals' holding here would have severe consequences. As the CEQ has explained, requiring a worst case analysis forces federal agencies to conduct wasteful and time-consuming inquiries into speculative impacts that lack "a firm connection between credible science and the hypothetical consequences of an agency's proposed action" (50 Fed. Reg. 32,236 (1985)). This sort of "pure conjecture * * * lacking a credible scientific basis is *not* useful to either the decisionmaker or the public" (*ibid.*, emphasis in original). The CEQ, after careful deliberation, properly elected to eliminate its worst case analysis requirement. The court of appeals improperly relied on a "contrived 'common law' rationale for overruling the CEQ" (Note, *supra*, 86 Mich. L. Rev. at 820).

## II. THE FOREST SERVICE MAY ISSUE A SPECIAL USE PERMIT FOR RECREATIONAL USE OF NATIONAL FOREST LAND IN THE ABSENCE OF A "COMPLETE MITIGATION PLAN"

The court of appeals not only misconstrued NEPA, it also imported its incorrect vision of NEPA into Forest Service regulations governing the issuance of special use permits. The Forest Service regulations at issue here require the applicant to include in its application "measures and plans for the protection and rehabilitation of the environment during construction, operation, maintenance, and termination of the project" (36 C.F.R. 251.54(e)(4)). The regulations further provide that a special use permit "shall contain: (1) Terms and conditions which will * * * (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and othe[r]wise protect the environment" (36 C.F.R. 251.56(a)(1)(ii)).[43] The court of appeals

[42] Even the respondents in *Marsh* v. *Oregon Natural Resources Council* have conceded (Br. in Opp. 11) that the CEQ's judgment is entitled to "substantial deference."

[43] The Forest Service regulations are reproduced in relevant part in Addendum B, pages 4a-5a, *infra*.

interpreted these provisions to require the Forest Service to prepare "an adequate mitigation plan" prior to issuing a permit (Pet. App. 5a n.3). The court specifically stated (*ibid.*):

> Since the mitigation "plan" here at issue is so vague and undeveloped as to be wholly inadequate [citing the court's discussion of NEPA mitigation requirements], the Regional Forester's decision to grant the special use permit could be none other than arbitrary, capricious and an abuse of discretion.

The court thus invalidated the Forest Service's decision to issue a special use permit on the ground that the Forest Service, by failing to satisfy the court's newly fashioned NEPA requirement that agencies prepare a "complete mitigation plan," failed to satisfy the agency's own regulations.

The court's reasoning does not withstand scrutiny. As a preliminary matter, the Forest Service regulations provide that a special use permit must "contain" various terms and conditions (36 C.F.R. 251.56(a)(1)(ii)); the regulations in no way expressly require the agency to prepare a mitigation plan as a procedural prerequisite in deciding whether to issue a permit.[44] And specifically, while the pertinent regulation states that a special use permit shall contain terms and conditions protecting the environment, it preserves the Forest Service's discretion to determine the appropriate terms and conditions. The Forest Service did not abuse its discretion here. In accordance with its standard practices, the Forest Service issued a special use permit that included a series of provisions conditioning all construction on the Forest Service's prior approval of a fully

[44] The special use permit in this case was issued to MRI on July 21, 1986, after the district court affirmed the Forest Service's decision and shortly after this case was argued before the court of appeals. We have lodged a copy of the two-part special use permit with the Clerk of the Court.



developed master plan (which was to contain detailed mitigation measures) and requiring the developer to protect scenic and aesthetic values, prevent soil erosion and degradation of water, soil, and air quality, and immediately to cease construction upon discovery of archaeologically or historically significant material. See U.S. Dep't of Agriculture Forest Service Special Use Authorization, Region 06, User No. 4171 (Methow Recreation Inc.), paras. 41, 44, 48, 49, 50, 54, 62, 76.[45]

The court of appeals exceeded its authority—here as well as under its interpretation of NEPA (see pages 21-38, *supra*)—in requiring the Forest Service to develop a judicially dictated "complete mitigation plan." The Forest Service's authority to issue the special use permit rested upon the Act of March 4, 1915, ch. 144, 38 stat. 1101, which provides in pertinent part (16 U.S.C. 497 (emphasis added)):

> The Secretary of Agriculture is authorized, *under such regulations as he may make and upon such terms and conditions as he may deem proper*, (a) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing and maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, and safety * * *.

See H.R. Rep. 99-709, *supra*, Pt. 1, at 2-3 (describing the permitting procedures).[46] Thus, Congress plainly gave the

[45] Many of the provisions contained therein are contained in every special use permit for a ski area development. See *Early Winters Study*, App. I (Sample Special Use Permit), paras. 46, 49, 53, 54, 56.

[46] Congress has substantially revised the permitting process through enactment of the National Forest Ski Area Permit Act of 1986, 16 U.S.C. (Supp. IV) 497b. See note 2, *supra*. The Forest Service issued the special use permit in this case prior to enactment of that statute. In any event, the new enactment preserves the government's broad discretion to determine appropriate permit conditions by providing

Secretary of Agriculture (and, through delegation, the Forest Service) broad authority to determine appropriate terms and conditions.[47]

Pursuant to that grant of authority, the Forest Service has consistently issued special use permits imposing terms and conditions similar to those employed here. The Forest Service originally instructed its personnel, through guidelines issued prior to NEPA's passage, that when authorizing special uses they should impose conditions to minimize harm to resources.[48] The agency promulgated its present regulations addressing permit terms and conditions in 1980. See 45 Fed. Reg. 38,324. Those regulations were intended to preserve the agency's "flexibility in tailoring authorizations to fit the actual situation" (*id.* at 38,325) and were not intended to change in any significant way the past practices for issuing ski resort special use permits.[49] The Forest Service regulations, by their terms, do

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that a ski area permit "shall be subject to such reasonable terms and conditions as the Secretary [of Agriculture] deems appropriate" (16 U S.C. (Supp. IV) 497b(b)(7)).

[47] The terms of this broad grant of authority also refute the court of appeals' conclusion (Pet. App. 16a) that 16 U.S.C. 497 is an independent source of mitigation requirements. Nothing in Section 497's language directs the Secretary to mitigate environmental damage absent a determination by the Secretary, by regulation or otherwise, that such mitigation is appropriate.

[48] See, *e.g.*, *1963 Forest Service Manual* § 2140.1 (in planning special uses, the agency's objective is to manage and protect resources and to minimize adverse effects to projects); § 2134 (special use permits must contain stipulations that ensure maintenance of productivity of land and resolution of conflicts with other planned or prospective uses).

[49] The regulations were promulgated to implement provisions of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, dealing with "rights-of-way" on federal lands. See 45 Fed. Reg. 38,324 (1980). "Procedures for authorizing other kinds of special uses are not significantly changed" (*ibid.*). Notably, the FLPMA provisions specifically exclude from their coverage rights-of-way "constructed and maintained in connection with commercial



not specify what mitigation measures must be incorporated into special use permits. There is no indication that they were ever intended to require the kind of "complete mitigation plan" that the court itself created—without statutory authority—in *Oregon Natural Resources Council* v. *Marsh, supra,* and reaffirmed in this case.[50] The Forest Service, instead, has routinely imposed terms and conditions similar to those ultimately imposed here.

The court of appeals' holding "runs roughshod over the established proposition that an agency's construction of its own regulations is entitled to substantial deference." *Lyng* v. *Payne,* 476 U.S. 926, 939 (1986). "In construing administrative regulations, 'the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " *United States* v. *Larionoff,* 431 U.S. 864, 872 (1977) (quoting *Bowles* v. *Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945)). The Forest Service's interpretation and application of its regulation here is plainly reasonable and deserves deference. By contrast, the court's decision, which would require every special use permit henceforth issued to contain a detailed plan to mitigate on- and off-site effects, is without basis in either the pertinent regulations or the governing statutes.

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recreation facilities on lands in the National Forest System" (43 U.S.C. 1761(a)(6)). The Forest Service is in the process of promulgating regulations, pursuant to the National Forest Ski Area Permit Act, specifically addressing ski area special use permits. See 16 U.S.C. (Supp. IV) 497b(c).

[50] Furthermore, the Forest Service has never interpreted these regulations as allowing it to require, as a condition contained in a special use permit, that a ski area developer mitigate effects on third-party lands. Thus, it was especially inappropriate for the court of appeals to construe these regulations as requiring the development of a "complete mitigation plan" that would address both on-site and off-site environmental impacts.

## CONCLUSION

The judgment of the court of appeals should be reversed with instructions to remand the case to the agency for further proceedings.[51]

Respectfully submitted.

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SEPTEMBER 1988

[51] On remand, the agency would be obligated to prepare a supplemental statement providing further elaboration on alternatives to the proposal and the proposal's impacts on air quality in the Pasayten Wilderness. See note 20, *supra*.

## ADDENDUM A

## CEQ REGULATIONS INVOLVED

I.

The Council on Environmental Quality's present regulation governing incomplete or unavailable information provides (40 C.F.R. 1502.22):

**§ 1502.22 Incomplete or unavailable information.**

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement: (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts

based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

II.

The Council on Environmental Quality's rescinded regulation governing incomplete or unavailable information (the "worst case" regulation) provided (40 C.F.R. 1502.22 (1985)):

**§ 1502.22 Incomplete or unavailable information.**

When an agency is evaluating significant adverse effects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.

(a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.



(b) If (1) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known (e.g., the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence.

## ADDENDUM B

## FOREST SERVICE REGULATIONS INVOLVED

The Forest Service's regulations governing special use permits provide in pertinent part (36 C.F.R. 251.54, 251.56):

**§ 251.54 Special use applications.**

* * * * * * *

(e) **Application content.** As a minimum, applications shall include the information contained in paragraphs (e)(1) through (5) of this section.

* * * * * * *

(4) **Environmental protection plan.** The applicant's proposed measures and plans for the protection and rehabilitation of the environment during construction, operation, maintenance, and termination of the project shall be required.

* * * * * * *

**§ 251.56 Terms and conditions.**

(a) **General.** Each special use authorization shall contain: (1) Terms and conditions which will (i) carry out the purposes of applicable statutes and rules and regulations issued thereunder; (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and othewise [*sic*] protect the environment; (iii) require compliance with applicable air and water quality standards established by or pursuant to applicable Federal or state law; and (iv) require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance if those standards are more stringent than applicable Federal stand-



ards; and (2) such terms and conditions as the authorized officer deems necessary to (i) protect Federal property and economic interests; (ii) manage efficiently the lands subject to the use or adjacent thereto; (iii) protect other lawful users of the lands adjacent to or occupied by such use; (iv) protect lives and property; (v) protect the interests of individuals living in the general area of the use who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (vi) require siting to cause least damage to the environment, taking into consideration feasibility and other relevant factors; and (vii) otherwise protect the public interest.

* * * * * * *

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# RESPONDENT'S

# BRIEF

(13)

Supreme Court, U.S.
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CLERK

No. 87-1703

In The

# Supreme Court of the United States

October Term, 1988

F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE, ET AL.,

*Petitioners,*

v.

METHOW VALLEY CITIZENS COUNCIL, ET AL.,

*Respondents.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR THE RESPONDENTS

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## QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act requires federal agencies to analyze practical measures to mitigate severe impacts to valuable resources.

2. Whether this case presents an issue ripe for adjudication regarding the obligations of federal agencies to conduct an uncertainty analysis pursuant to the new regulation of the Council on Environmental Quality (40 C.F.R. 1502.22(b) (1986)).

3. Whether the decision to issue special use permits was arbitrary and capricious in the absence of mitigation plans required by Forest Service regulations.

## PARTIES TO THE PROCEEDING

Respondents accept petitioners' description of the parties to the proceeding. Methow Valley Citizens Council, Washington Environmental Council, and Sierra Club are all not-for-profit corporations. None of the respondents has any parent companies, subsidiaries, or affiliates. This statement is provided pursuant to Supreme Court Rule 28.1.



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## COUNTER-STATEMENT OF FACTS

### A. The Methow Valley.

The Methow Valley is a pristine rural area bounded by the Pasayten Wilderness on the north, the North Cascades National Park on the west and the Sawtooth Wilderness on the south. Sandy Butte lies at the upper end of the Methow Valley on the eastern slopes of the North Cascades Mountains.

The Methow Valley is remote. The Cascade Mountains pass connecting the valley with Western Washington population centers is closed by snow for six months each year. Access from Seattle during the winter is via a six or seven hour, circuitous route over another Cascades pass. The valley has no commercial air, train, or bus service. Early Winters Alpine Winter Sports Study (hereinafter "EIS") 55, 58-59.

The Methow Valley is blessed with a rich environment. The valley provides critical winter range and migration corridors for Washington's largest migratory deer herd. Tr. 271. Sandy Butte's Cedar Creek is among the most productive cutthroat trout fisheries in the Okanogan National Forest. EIS 36. The Methow Valley and Sandy Butte are areas of spectacular natural beauty and offer an exceptional outdoors experience for visitors and residents alike:

> Quality of life is a factor not easily measured or captured in words, and yet the human feelings involved are of the utmost importance. For the people of the Methow it is evinced in the atmosphere of intimacy and trust that exist here, in the absence of many urban problems (crime, noise, pollution, etc.), in the peace of mind that the quiet of the valley encourages, in the privacy, in the freedom of movement amid the open spaces, and in the freedom to be and to support oneself. These qualities are largely the benefits of a low population density living in a well defined, unspoiled area of great natural beauty. Clean air, clean water, the forests, the fields, the

wildlife are all integral parts of the whole, and all have an important place in the planning process.

Methow Valley Plan, An Addendum to Okanogan County's Comprehensive Plan (1976) at 5.

**B. Permitting Construction of the Ski Hill Will Induce Development in the Valley Causing Severe Environmental Impacts.**

Methow Recreation, Inc. (MRI)[1] seeks Forest Service authorization to build a ski area on Sandy Butte, federal land managed by the Forest Service. Most significant impacts of the project will occur off-site as development induced by the ski hill spreads through the valley. MRI controls 1,165 acres of private property adjacent to Sandy Butte on which it proposes to develop a "four-season" resort. EIS 8. Ski hill approval is expected to generate numerous other private developments. Lodges, motels, restaurants, and other commercial establishments will fill the area closest to the ski resort. Residential development will spread throughout the valley. EIS 105-06. Population is projected to jump from 3,963 in 1984 to 7,221 in 2000. EIS 90. In sum, "[t]he rural character of the Methow Valley will give way to a more urban setting . . . " EIS 145.

Urbanization of the valley poses a much greater threat to wildlife habitat and air quality than does the construction of ski lifts and runs on Sandy Butte itself.[2] The EIS concluded that "[i]mpacts from construction,

---

[1] Defendant MRI is nominally a respondent, but is aligned with petitioners Robertson, et al., and has filed a brief in support of the Government's position.

[2] The EIS draws the line between so-called direct and indirect impacts at the boundary of the Forest Service managed land. *See* EIS 7-8, 65. Thus, impacts resulting from development of MRI's adjacent "base lands" and other private property in the valley are labelled "indirect." The focus of this appeal is on the adequacy of the EIS's assessment of measures to mitigate these "indirect" impacts.



maintenance, and operation of the proposed 'hill' development on National Forest land will not have a measurable effect on existing or future air quality," EIS 65, but acknowledged that air quality impacts resulting from residential development will be considerable:

> [I]mpacts from secondary development on private land with all alternatives (I-V) will have a significant effect on air quality during severe meteorological inversion periods. As population density increases, incremental degradation will take place with each successive level of development.

EIS 65.[3]

Even without a ski hill, gradual development in the valley would cause air pollution levels to rise. EIS 66-67 (Table 9). But development spawned by the ski hill would result in many more woodstoves and fireplaces with an additional doubling or more of the air pollution levels in areas of the valley closest to Sandy Butte. *Id.* Unmitigated, the project would induce increased air pollution which would exceed ambient air quality standards by a factor of five and non-degradation standards by a factor of twenty.[4]

---

[3] The air pollution problems facing the Methow Valley are not unique. Recent studies have dispelled the notion that mountain air in the western United States is always fresh and clean. Increased use of woodstoves and fireplaces has combined with air inversions in mountain valleys throughout the West to produce pollution problems that rival those of urban areas. *See, e.g.*, Dresser, Alan, "A Dispersion and Receptor Model Analysis of the Wintertime PM-10 Problem in Telluride, Colorado," *PM-10 Implementation of Standards*, edited by C. V. Methai and D. H. Stonefield, published by Air Pollution Control Association, Pittsburgh, Pennsylvania (1988).

[4] Wintertime air pollution from particulate matter is currently measured in the range of 2 to 15 micrograms per cubic meter ($ug/m^3$), EIS 27, virtually as clean as air can be. Development induced by the ski hill will cause particulate pollution

(Continued on following page)

Development in the valley will destroy or block access to habitat critical to the state's largest migratory deer herd. The Forest Service decided to proceed with the project without knowing the extent of the expected loss of the deer herd's winter range, migration routes, fawning grounds, and staging areas, and without assessing the impact of these losses on the herd's population. The Forest Service estimated that deer winter range "would suffer" as the result of development of MRI's "base area" and other nearby development. EIS 76. No effort was made to estimate the magnitude of this "suffering." No consideration was given to off-site losses of migration routes, fawning grounds, and staging areas. Tr. 412. The state's game biologist testified that the study upon which the EIS was based was "not adequate" for assessing impacts to the herd. Tr. 280.[5]

With so little habitat information, the Forest Service could not specify the project's impacts on the herd size beyond the general observation that the herd would be

(Continued from previous page)

to rise to 358 ug/m³ in Twisp, 764 ug/m³ in Mazama, and 842 ug/m³ in Winthrop. EIS 66-67. (Twisp, Mazama, and Winthrop are the closest towns to the proposed development.) The ambient air quality standard is 150 ug/m³. 40 C.F.R. 50.6. The maximum degradation allowed is 37 ug/m³, 42 U.S.C. 7473(b)(2); Wash. Adm. Code 173-403-080 (adopting by reference, 40 C.F.R. 52.21(c)).

[5] The environmental importance of the state's largest migratory deer herd is matched by its recreational and economic importance. The Washington Department of Game attributes 40,000 "recreational days" to the herd. (A "recreation day" is a day spent in the field by a sportsperson.) Tr. 273. The opening weekend of the hunting season is the highest receipt days for businesses in Winthrop and Twisp. *Id.* The State would lose $3 million in direct revenues if a 50 percent herd loss were sustained. Letter from Lockard, Director of Game, to Ritchie, NEPA Coordinator, Department of Ecology, Nov. 18, 1982, *reprinted* in EIS, ff. D-72.



"noticeably reduce[d]." EIS 76. Taking into account the uncertainty over the loss or disruption of migration routes and fawning areas, the Washington Department of Game concluded that "the ultimate impact on the Methow deer herd could exceed a 50 percent reduction in numbers." *Id.*[6] The state agency recommended that the project not proceed. Letter from Lockard, Director of Game, to Ritchie, NEPA Coordinator, Department of Ecology, Nov. 18, 1982, *reprinted* in EIS, ff. D-72.

### C. The EIS Listed Potential Mitigation Measures But Did Not Analyze Them.

The EIS concluded: "State air quality standards can be met with mitigation." EIS 145. *See also* EIS 67 ("[t]he numerous mitigation measures discussed at the end of this section (Air Quality) will greatly reduce the impacts

[6] The state agency couched its estimate in broad terms ("could exceed . . . 50 percent") because it recognized that important baseline information was missing. The Forest Service acknowledged that it was informed by the state agency that the data was inadequate for making numerical estimates. Tr. 413. The Government claims "the state agency's representative was unable to explain how the agency had reached [the 50 percent] assessment," Pet. Br. 8, n.8, *citing* Tr. 388-90, but its citation is to testimony of a Forest Service representative who, under cross-examination, admitted that the reason for the state's reticence was the lack of adequate data to make firm estimates. Tr. 413.

That the Government finds it necessary to argue the evidence only emphasizes the failure of the EIS to resolve such great uncertainty, and is a tacit admission that the difference between a possible 14 percent loss of winter range and loss of more than half of the State's largest deer herd may be the difference between an acceptable and unacceptable project. The Forest Service is just now completing a study which included extensive field work to determine migration routes, fawning areas, and the full extent of the herd's winter range. *See* p. 11, infra.

presented by the model"). A number of mitigation opportunities were listed: Okanogan County "will initiate the formation" of a local air pollution control authority; the County "will develop an airshed management plan;" and the airshed management plan could include mandatory weatherization of new construction, restricting wood heat sources, encouraging the use of "alternative, non-polluting energy sources," and establishing monitoring and enforcement programs. *Id.* 68-69.

This list is the beginning and end of the EIS's "discussion" of air quality mitigation measures. The effectiveness of the listed measures was not assessed. The costs of the measures, likelihood of implementation, and their enforceability were completely ignored. The costs of weatherization were not addressed. The costs and political obstacles to limiting the use of wood, a very popular heat source in the cold and remote Methow Valley, were ignored. The "alternative, non-polluting energy sources" offered as a pollution cure were not even identified.[7]

The EIS listed mitigation measures "which will alleviate" adverse effects on wildlife, such as tax incentives and conservation easements to encourage less development in the herd's winter range and migration routes. *Id.* 77-78. Presumably local government will bear the costs of such measures. Pet. Br. 10. As with air, the EIS provided no assessment of the expected effectiveness or costs of any of the promised mitigation. The EIS described rezoning as "essential" and guaranteed its occurrence, EIS 77, but did not state whether zoning (or any of the other listed measures) has worked to protect deer herds elsewhere. Nor did the EIS explain what kinds of zoning

[7] The EIS stated that some air quality mitigation measures would be accomplished through the 3,900 acre ski hill site plan process, EIS 69, and left open the possibility of imposing additional mitigation requirements later in the process. EIS 14. The Government acknowledges that these provisions relate to on-site (i.e., federal land managed by the Forest Service) mitigation only. Pet. Br. 32, n.32.



measures are needed or consider the difficulties and political obstacles to adopting new zoning laws which would satisfy the competing objectives of protecting both private property rights and the deer's critical habitat.[8]

Because the Forest Service had not yet gathered data to determine the extent and location of critical habitat, the EIS could not assess the cost and feasibility of acquisitions, conservation easements, or other means of limiting development to protect wildlife. Nor did the Forest Service respond to the state agency's recommendation of six areas of key habitat which should be protected by acquisition. Letter from Lockard, *supra*, EIS ff. D-72. Nonetheless, the EIS concluded that the mitigation measures listed "will alleviate adverse effects on wildlife." *Id.* at 77.

### D. The Regional Forester Relied on the Promise of Effective Mitigation Measures.

The Regional Forester reviewed the EIS and decided to proceed with the project. Pet. App. 63a. Having read an EIS which promised that "air quality standards can be met with mitigation," that "numerous mitigation measures . . . will greatly reduce the [air] impacts," and that "mitigation measures . . . will alleviate adverse effects on wildlife," the Regional Forester concluded that the Forest Service lands could be developed "in an environmental[ly] acceptable manner." Pet. App. 65a. He believed that "[p]ractical measures to reduce the adverse impacts have been, or are in the process of being, implemented by Okanogan County." *Id.* 67a. His 1984 "Record of Decision," Pet. App. 63a-71a, did not state whether all practicable mitigation measures were being adopted, and if not, why not. 40 C.F.R. 1505.2(c).

[8] The Government goes beyond the record to mislead the Court by representing that such rezoning has now occurred. Pet. Br. 10-11, n.13. But the amendments are entitled "interim" and no assessment has been made of their effectiveness, if any, in protecting the herd's habitat.

The Government asserts that a subsequent phase of environmental review will provide analysis of mitigation measures. Pet. Br. 6-7. But after the Forest Supervisor issued special use permits in 1986[9] without the promised further review, the Chief of the Forest Service dismissed environmental claims in an appeal on the basis that off-site mitigation issues were resolved by the Regional Forester's 1984 decision and were not subject to further review.[10]

### E. The Ski Hill Permits Do Not Call For Analysis of Mitigation Measures for Off-Site Development.

The permits issued to MRI provide for no further analysis of impacts from off-site development (including MRI's 1,165 acres immediately adjacent to Sandy Butte) and no further analysis of mitigation opportunities to alleviate those impacts. The permits pertain only to the 3,900 acre ski hill managed by the Forest Service at Sandy Butte.

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[9] Following the July, 1984 decision to proceed with the project, the Forest Service undertook to identify a qualified developer. In July, 1986, two permits were issued to MRI. The permits have been lodged with the Clerk by the Solicitor General.

[10] *See* Letter from R. Max Peterson, Chief, U.S. Forest Service to David Bricklin dated Dec. 12, 1986 (in 1984 the Regional Forester decided that "there will be no unfavorable environmental impacts which cannot be mitigated; or which are not counter balanced by offsetting benefits" . . . ; "Having been decided, these issues are not relevant to the decision made by Supervisor McLaughlin to issue special use permits to MRI"). A copy of this letter is being lodged with the Clerk of the Court. Neither this letter nor the MRI permits to which it relates are in the administrative record but both have been lodged by the parties because of their relevance to the Government's "phased review" argument.



The Term Special Use Authorization permits construction and operation of ski facilities on 80 acres at the base of Sandy Butte:

> [This permit is] issued for the purpose of planning, constructing, operating, and maintaining facilities, including ski lifts and utility lines, in support of four season recreation uses, authorized in the Site Development Plan (Master Plan) required by Clause 42 and which will be attached and become a part of this authorization.

Term Special Use Authorization 1. The second permit, the Special Use Authorization, authorizes construction of ski trails and runs on the remaining 3,820 acres of the mountain and incorporates by reference Clause 42 of the 80 acre, "term" permit. Special Use Authorization, p. 1.

> The referenced Clause 42 provides in its entirety: The holder [of this permit] shall prepare a Site Development Plan (Master Plan) to show the location of all buildings, service areas, roads and structures. Such plan shall be on a scale of 1" = 400' with 20 foot contour intervals. The holder is encouraged to consult with the authorized officer during the preparation of the Site Development Plan to ensure that it is adequate and to gain multiple use compliance. No construction shall be undertaken by the holder prior to Site Development Plan approval.

Clause 42 makes no provision for any additional environmental review of "off-site" impacts (including the 1,165 acre development planned by MRI on its adjacent land), nor for measures to mitigate them.[11] The only matters addressed by the Clause 42 site plan are the placement of ski runs and a few structures on the 3,900 acres covered by the permits. EIS 13. The site plan will not provide the

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[11] Other clauses of the permits require that consideration be given to mitigating only on-site impacts. *See, e.g.*, Clause 53 (erosion control plans), Clause 44 (reseeding plan), Clause 62 (archaeological preservation), and Clause 50 (protection of aesthetics).

Forest Service with any additional information about the much more extensive development anticipated on the adjacent, privately owned 1,165 acre "base area," EIS 13-14, or elsewhere in the valley. EIS 103-05.[12]

### F. The Memoranda of Understanding Do Not Analyze Mitigation Measures.

After publishing the EIS and deciding to issue permits, the Forest Service entered into "memoranda of understanding" with other government agencies contemplating studies of impacts to the deer herd, Ex. 102, Tab 46, Ex. H, and to air quality, Ex. 102, Tab 53. These memoranda contemplate future analyses of possible mitigation measures but do not provide the missing analyses themselves.

The parties to the memoranda state that they "agree" to certain actions, but no binding commitments are made. *Ibid*. Instead, the signatories may withdraw from the memoranda for any (or no) reason on 30 days notice. Each agency refused to make any financial commitment to implement mitigation measures. *Id*.

The memoranda state that Okanogan County will implement a dog control ordinance and protective zoning for the protection of the deer herd and adopt an air quality ordinance or other air mitigation measures. No

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[12] The Government states that the only purpose of the permits is to "provide the developer with an assurance . . . that the Forest Service will not authorize another developer to undertake the proposed project." Pet. Br. 4-5, n.4. But MRI was assured from the outset that it would be the permittee. The EIS was prepared in response to MRI's application, EIS 1, and the Regional Forester's decision to issue permits was premised on the "parcel of privately-owned land (1,165 acres) contiguous to the base of Sandy Butte . . . in single ownership [which] will assist in the orderly and efficient development of facilities needed in support of skiing." Pet. App. 65a. In fact, the permits represent the transfer of occupation and use rights from the Forest Service to MRI. 36 C.F.R. 251.55.



particular ordinances or zoning provisions are identified. There has been no assessment of the effect these measures will have on reducing the otherwise significant environmental impacts.

### G. Two Post-EIS Studies Could Have Been Completed For Use in the EIS.

A study of the Methow mule deer herd was on-going at the time of trial and was designed to identify migration routes, fawning grounds, and other critical habitat to allow development of mitigation measures. Tr. 268-71, 300. (The field work was completed recently and the report will soon be issued.) The Forest Service could have undertaken the study before making its decision. Tr. 309, 412. But for the agency's decision not to fund the study earlier, the agency could have had the baseline information necessary to understand the anticipated impacts and assess mitigation opportunities prior to deciding whether to issue the permits. *Id*.

Completion of this study was not dependent upon preparation of the site plan referenced in Clause 42 of the permits. The site plan has not yet been prepared.

A post-EIS study of the effectiveness of an air quality ordinance also has been completed – again without need to await preparation of a site plan. The Environmental Protection Agency (EPA) has analyzed the County's new air quality ordinance, and concluded – contrary to the promise of the EIS – that federal (and state) non-degradation standards will be violated even with the oft-cited air quality ordinance in place. *See* Memo from Robert B. Wilson, Regional Meteorologist to Ann Williamson, Air Program Branch, Environmental Protection Agency, Jul. 2, 1987.[13] The Government offers no reason why the analysis could not have been undertaken prior to deciding to proceed with the project.

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[13] A copy of the Environmental Protection Agency memorandum has been lodged with the Clerk of the Court.

### H. Lower Court Proceedings.

Following exhaustion of administrative remedies, respondents filed this action challenging, *inter alia*, the adequacy of the EIS. Magistrate Dale recognized that a "[m]ere listing of mitigation measures in an EIS is generally inadequate," Pet. App. 41a, but concluded that "in this EIS there is more – not much more – but more than a mere listing of mitigation measures as to the deer herd." *Id.* He also held adequate the analysis of mitigation relating to air quality. *Id.* 45a-46a.

The magistrate concluded that the agency's substantive decision was not subject to judicial review. Pet. App. 30a & n.4. But the magistrate did not consider the effect of 36 C.F.R. 251.54(e)(4) which requires applications for special use permits to include "plans for the protection . . . of the environment."

Respondents' appeal challenged both the adequacy of the EIS and the magistrate's ruling that the agency's substantive decision was unreviewable because there was no law to apply. Respondents did not claim that the decision to issue the permits violated a substantive duty created by NEPA. Nor did respondents claim that NEPA requires a complete mitigation plan. Respondents challenged the failure of the EIS to analyze the mitigation measures listed in the EIS.

The court of appeals found the EIS discussion of impacts to the deer herd inadequate on two grounds. First, the EIS assumed mitigation measures would be implemented and would effectively minimize impacts to the herd. But without an assessment of the effectiveness of potential mitigation measures, the conclusion lacked foundation. Pet. App. 12a-13a. Second, there was "insufficien[t] . . . data" to assess the unmitigated impacts of the development, "for example, [the impact of] residential development reasonably certain to follow development of ski slopes on Sandy Butte." *Id.* 13a. In dicta, the court of appeals stated that if the subsequent winter ecology



study of the deer herd resulted in still incomplete information, a worst case analysis would be required. Pet. App. 14a.[14]

The court of appeals also held the discussion of air quality inadequate on two grounds. First, the EIS erroneously concluded that there would be an insignificant impact on air quality in the adjacent Pasayten Wilderness Area. Pet. App. 15a. The Government does not challenge this holding. Pet. Br. 50, n.51. Second, the EIS concluded, again without analysis, that violations of air quality standards could be avoided by use of mitigation measures. Pet. App. 15a.

The court of appeals found that the EIS lacked "both a detailed description of required or possible mitigation measures, and any analysis as to the effectiveness of these measures," *id.* 18a, and ruled the mitigation discussion inadequate. *Id.* 19a.

The court held the Regional Forester's decision to issue the permits violated the agency's own regulations requiring applicants to submit mitigation plans and permits to contain mitigation conditions. Pet. App. 5a.

## SUMMARY OF ARGUMENT

1. While this Court often has emphasized that NEPA's requirements are essentially procedural, the Court has been equally vigilant to emphasize the purpose

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[14] The Government has not challenged the court of appeals' holding that the habitat data was too "cursory" to allow an informed assessment of the impacts to the deer herd. Pet. App. 14a. Despite a single contrary statement by the Government, Pet. Br. 20, n.20, this holding was not identified by the Government as an issue in its petition and is not argued by the Government in its brief. The court's holding that the baseline habitat data was inadequate stands apart from the issues central to the Government's appeal: whether a "complete mitigation plan" is required and whether a worst case analysis may be necessary on remand.

of the procedures – protection of the environment. *See, e.g., Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772-73 (1983) (NEPA goals stated in "sweeping terms of human health and welfare"); *Andrus v. Sierra Club*, 442 U.S. 347, 349 (1979) (goals stated in "bold strokes"); *Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978); *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976) (NEPA "announced a national policy of environmental protection").

These important goals are achieved only through fully informed decisionmaking, under the watchful eye of a fully informed public. *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983). NEPA's "detailed statement," or EIS, "is the outward sign that environmental values and consequences have been considered." *Andrus v. Sierra Club*, 442 U.S. at 350; *see Kleppe*, 427 U.S. at 410 (courts must ensure that agencies have taken a "hard look" at environmental consequences).

The nation's environmental protection policy is frustrated when agencies do not use "all practicable means" to avoid environmental harm, do not comply to the "fullest extent possible," or otherwise "trivialize" their NEPA duties. 42 U.S.C. § 4332; *Kleppe*, 427 U.S. at 409; *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787 (1976); *Andrus v. Sierra Club*, 442 U.S. at 357-58. Avoiding analysis of mitigation is not compliance to "the fullest extent possible."

a. The Government's complaint that the court of appeals has imposed new mitigation procedures "found nowhere" in NEPA or the CEQ implementing regulations is unfounded. Pet. Br. 16. Mitigation must be discussed in detail to satisfy NEPA's command to address adverse effects "which cannot be avoided" if the proposal proceeds. 42 U.S.C. § 4332(2)(C)(ii). The CEQ regulations recognize that a proper mitigation analysis is critical to



the fulfillment of NEPA's environmental protection policies by requiring agencies to include mitigation measures as alternatives to the proposal, 40 C.F.R. 1502.14(f), to utilize mitigation analysis in assessing the impacts, 40 C.F.R. 1502.16(h), and to explain clearly the reasons for adopting or rejecting specific measures in the agency's "Record of Decision." 40 C.F.R. 1505.2(c).

The Early Winters EIS's "vague," "undeveloped," and "wholly inadequate" list of unassessed mitigation possibilities did not permit an informed judgment. Pet. App. 5a, n.3, 17a-19a. The Government offers no arguments to contest this holding, conceding that agencies "must . . . discuss mitigation in a manner that aids reasoned decisionmaking." Pet. Br. 25. Instead, the Government's argument is directed at peripheral statements unnecessary to the court's holding.

This case well illustrates the dangers of trivializing mitigation analysis to a mere "wish list" for future consideration by others. The Forest Service has committed to proceed with ski area development without knowing whether severe impacts to deer and air are avoidable and at what cost. It avoided consideration of mitigation when it made its decision in 1984, but then ruled in 1986 that mitigation was a decided issue and that no further analysis of off-site impacts would be required.

To justify this avoidance the Government urges critical propositions which are directly contrary to the CEQ regulations which the Government describes as a "blueprint for compliance" with NEPA. Pet. Br. 30. Thus, it is claimed that discussion of the project's "more serious" impacts is not possible because they are "secondary," Pet. Br. 7-8, contrary to CEQ's directive that all "significant" impacts, both "direct" and "indirect," be addressed. 40 C.F.R. 1502.16(a)&(b), 40 C.F.R. 1508.8. Similarly, the Government's reliance on a future "tier" of environmental review is contrary to CEQ's mandate that environmental information *"must"* be "available to public officials and citizens *before* decisions are made and *before* actions are

taken," 40 C.F.R. 1500.1(b) (emphasis added), especially where (as here) the future "tier" will *not* address the "more serious" off-site impacts.

The inevitable result of action before analysis is unnecessary conflict, cost, and delay. Because mitigation analysis was avoided, debate over what measures should be imposed and who will pay for them may later disrupt the project. The CEQ regulations recognize that addressing the difficult issues early is essential "to avoid delays later in the process, and to head off potential conflicts," 40 C.F.R. 1501.2, but the Forest Service neglected these basic principles.

b. The Government again skirts the periphery in attacking the court's call for a worst case analysis on remand if the new mule deer study is incomplete. There is no argument to challenge the court's holdings that the EIS deer study failed to make clear that information was lacking, 40 C.F.R. 1502.22, and was too conclusory. Pet. App. 13a-14a. The recently completed study was intended to provide the missing information, and the Court therefore should avoid premature and hypothetical debate over CEQ's new regulation.

2. The Government contends that the court of appeals "imported" its incorrect view of NEPA into the Forest Service regulations, Pet. Br. 18, 45, but in fact the reverse is true. The Regional Forester violated the unambiguous requirements of his own regulations by failing to require MRI to submit a mitigation "plan," and by omitting mitigation conditions from the special use permits. Honoring these obligations would have facilitated the Forest Service's ability to discuss mitigation in its EIS by taking advantage of the information in the applicant's mitigation plan. Judicial deference to agency interpretations is not at issue because the regulations are unambiguous and because there is no evidence of the claimed "interpretation."



## ARGUMENT

### I. NEPA REQUIRES FEDERAL AGENCIES TO DISCUSS MITIGATION AND ADDRESS UNCERTAINTY.

Congress enacted the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, "to promote efforts which prevent or eliminate damage to the environment and biosphere." *See also* 40 C.F.R. 1500.1(a) (NEPA "is our basic national charter for protection of the environment"). These goals are achieved through the detailed statement required for major federal actions. 42 U.S.C. § 4332(2)(C). The detailed statement must discuss environmental impacts including unavoidable impacts and alternatives to the proposal, so that the decisionmaker and public will be fully informed. *Id.*[15]

It is the Forest Service and not the court of appeals that "departs from precedent and established practice" (Pet. Br. 19) by ignoring uncertainty and by relying on a list of mitigation "opportunities" without discussion. Indeed, the Forest Service itself has urged other federal agencies to "formulate[] and include[] . . . a mitigation plan . . . as part of the project," *Environmental Defense Fund v. Froehlke*, 473 F.2d 346, 349, n.7 (8th Cir. 1972), but now contends this is "foreign to NEPA." Pet. Br. 17.

The Government invites the Court to approve postponement of mitigation analysis in the name of "systematic project development," Pet. Br. 20, but does not explain what will happen when future review limited to "on-site" development only leaves unresolved the "more serious" off-site impacts which were too "difficult" to assess in the EIS. Pet. Br. 8-9 & n.10. The risks (and costs) of such

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[15] The substantive goals, procedural requirements, and legislative history of NEPA are detailed further in the briefs of *amici curiae* Environmental Defense Fund, et al., and State of California, et al.

postponement are transferred to the states and local governments, *see* Br. of *Amicus Curiae* State of California, et al., inviting future conflict contrary to the fundamentals of sound project planning. *See* Br. of *Amicus Curiae* American Planning Association.

**A. Because mitigation analysis is NEPA's critical link to better agency decisions, mere listing of possible measures in the Early Winters EIS is inadequate.**

NEPA's distinct command that the "detailed statement" discuss "adverse environmental effects which cannot be avoided," 42 U.S.C. 4332(2)(C)(ii), provides a strong foundation for CEQ's directive that mitigation measures must be discussed both in comparing alternatives (the "heart" of the EIS) and in assessing the "effects" of proposals. 40 C.F.R. 1502.14(f) (detailed discussion of alternatives shall include "appropriate mitigation measures not already included in the proposed action or alternatives"); *id.* 1502.16(h). This regulatory framework recognizes that mitigation analysis is critical to developing better agency proposals ("alternatives") and to lessening the adverse impacts ("effects") of agency activities. The Government agrees with this basic premise. Pet. Br. 25 ("NEPA requires environmental analysis and disclosure and the Government must therefore discuss mitigation in a manner that aids reasoned decision making"); *id.* 30, n.29.

Consideration of an appropriate range of mitigation measures, supported by an assessmen.. of their cost and effectiveness, enables agencies to employ "all practical means . . . to avoid or minimize any possible adverse effects." 40 C.F.R. 1500.2(f). A well conceived and developed mitigation analysis provides the bridge between "understanding of environmental consequences" and "actions that protect, restore, and enhance the environment." 40 C.F.R. 1500.1(c). These goals are sacrificed when mitigation is trivialized to "mere vague statements



of good intentions" to be evaluated later and implemented by others. *Preservation Coalition v. Pierce*, 667 F.2d 851, 860 (9th Cir. 1982); see 40 C.F.R. 1500.1(c) (the point is "not to generate . . . even excellent paperwork – but to foster excellent action"); *id.* 1500.2(e).

The critical role of mitigation carries forward from the EIS to the agency's decision. Agencies are required to prepare a "concise public record of decision" and:

> (c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not.

40 C.F.R. 1505.2. *See also* 40 C.F.R. 1505.3 (agency must confirm that mitigation measures are implemented). The Government acknowledges these regulations, Pet. Br. 29, but the Forest Service was unable to comply with them because it has not yet determined what measures are "practicable," let alone decide which should be adopted and why.

**1. The adequacy of an EIS analysis of mitigation measures should be judged by a "rule of reason" which takes into account the severity of the impact, the importance of the resource at risk, feasibility, and effectiveness.**

A "rule of reason" already governs judicial review of EIS adequacy with respect to alternatives and impacts. See *NRDC v. Morton*, 458 F.2d 827, 834-37 (D.C. Cir. 1972) (alternatives); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974) (impacts). *See also* 40 C.F.R. 1502.22(b) (1986) (rule of reason for uncertainty analysis).[16] In view

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[16] The Government's challenge to the use of a "reasonableness" standard to review agency decisions not to prepare a supplemental EIS in the companion case (*Marsh v. Oregon Natural Resources Council*, No. 87-1704) presents an entirely different question and should not be confused with the use of a "rule of reason" to guide review of EIS adequacy. The

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of the important role mitigation plays in both alternatives and impacts analysis, 40 C.F.R. 1502.14(f), 1502.16(h), the same rule of reason should guide review of an agency's discussion of mitigation.[17]

The rule of reason is intended to avoid the trivialization of NEPA by focusing the discussion on issues truly critical to the decision while excluding peripheral considerations. *See, e.g., Andrus v. Sierra Club*, 442 U.S. at 357-58; *Coalition for Responsible Regional Development v. Coleman*, 555 F.2d at 400 (rule implements "hard look" and "arbitrary and capricious" standards); *NRDC v. Morton*, 458 F.2d at 834, 837; 40 C.F.R. 1500.1(b) ("NEPA documents must concentrate on the issues that are truly significant . . . , rather than amassing needless detail"); 40 C.F.R. 1500.2(b) ("emphasize real environmental issues and alternatives"); 40 C.F.R. 1502.15 ("avoid useless bulk . . . concentrate effort and attention on important issues"). The court of appeals properly applied the rule of reason, holding the EIS inadequate only after determining that its deficiencies went to critical rather than "inconsequential, technical" issues. Pet. App. 8a, 16a, n.13.

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circuit courts routinely apply the "rule of reason" to review EIS adequacy. *See, e.g., Druid Hills Civic Ass'n v. Federal Highway Admin.*, 772 F.2d 700 (11th Cir. 1985); *Environmental Defense Fund v. Hoffman*, 566 F.2d 1060, 1067 (8th Cir. 1977). Some courts have equated "rule of reason" with review under the arbitrary and capricious standard urged by the Government in *Marsh. E.g., Coalition for Responsible Regional Development v. Coleman*, 555 F.2d 398, 399-400 (4th Cir. 1977).

[17] Several courts already use the rule of reason to review an agency's incorporation of mitigation into its alternatives or impacts discussion. *See, e.g., Alaska v. Andrus*, 580 F.2d 465, 472, 477-81 (D.C. Cir.), *vacated*, 439 U.S. 922 (1978); *Coalition for Responsible Regional Development v. Coleman, supra; Environmental Defense Fund v. Hoffman, supra* at 1071.



CEQ regulations and case law identify several factors which are useful in applying the rule of reason to mitigation. Among the more obvious are severity of the impact, importance of the affected resource, and feasibility and effectiveness of mitigation. For example, greater attention to mitigation for more severe impacts clearly is "reasonable." *See* 40 C.F.R. 1508.27(b) ("severity" as a component of "significance"). *See also* 40 C.F.R. 1500.2(b).

The Government acknowledges that it has deferred detailed discussion of mitigation for the "more serious" project impacts, and attempts to justify this because it is difficult to evaluate so-called "secondary" impacts. Pet. Br. 7-9. But the CEQ regulations described by the Government as "a blueprint for compliance" (Pet. Br. 30) expressly reject the notion that the distinction between primary and secondary impacts is "significant" (Pet. Br. 7), warranting deferral of the more difficult issues.

Instead, the regulations define "effects" to include "indirect effects," such as "growth inducing effects and other effects relating to induced changes in the pattern of land use, population density or growth rate, and related effects on . . . natural systems, including ecosystems." 40 C.F.R. 1508.8. The regulations command detailed discussion of both "direct" and "indirect" effects, on equal footing. 40 C.F.R. 1502.16(a) & (b); *see Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774, 783 (9th Cir. 1980) ("so-called 'secondary' impacts are often as significant as 'primary' effects"); *Environmental Defense Fund v. Hoffman*, 566 F.2d at 1067; *Trout Unlimited v. Morton*, 509 F.2d at 1283, n.9 ("the central focus should not be on a primary/secondary impact analysis but upon those impacts . . . which have a 'significant impact' "); 42 U.S.C. § 4331(a) (impacts of growth, urbanization).

Whether the most severe impacts be "primary" or"secondary," the Forest Service here stood reason on its head by committing to specific mitigation for less severe on-site impacts while deferring attention to the more

severe impacts for which effective mitigation is needed for an environmentally acceptable project. Pet. Br. 32-35.[18]

The importance of the resource affected by a proposal provides further guidance to an agency determination of what level of mitigation evaluation meets the rule of reason. Reference to other environmental protection statutes (such as the Clean Air Act) lessens the need for subjective value judgments. *See* 40 C.F.R. 1508.27(b)(10). For example, an agency should work harder to mitigate a proposal's effects on an endangered species. *See, e.g., Friends of Endangered Species v. Jantzen*, 760 F.2d 976 (9th Cir. 1985) (well developed and demonstrably effective plan to minimize project's impacts on habitat of endangered butterfly); 40 C.F.R. 1508.27(b)(9). *See also id.* 1508.27(b)(3), (4).

The feasibility of individual mitigation measures also helps determine how much attention is "reasonable." *Vermont Yankee*, 435 U.S. at 551 (level of detail in EIS must be determined in light of "feasibility" and "common sense"). Just as NEPA does not require consideration of impacts which are "remote or speculative," *Trout Unlimited v. Morton*, 509 F.2d at 1283, neither should an agency devote its resources to assessing mitigation measures which cannot be implemented. *NRDC v. Morton*, 458 F.2d at 837 (several "alternative" energy sources deemed too futuristic).

On the other hand, available measures or technologies clearly warrant further evaluation. *Id.* (increased use of nuclear power or natural gas). Only then can the

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[18] Moreover, the Government's reliance on the primary/secondary distinction fails factually because the EIS assumed that the "absence of physical barriers and the occurrence of migration outside of the ski season should allow uninterrupted movement of mule deer," EIS 76, without taking into account the "four-season" nature of the proposal. Tr. 430-31.



agency state with confidence whether an otherwise unacceptable impact can be avoided or minimized to acceptable levels at a reasonable cost, 40 C.F.R. 1500.2(f), or whether the impact truly is "unavoidable." 42 U.S.C. § 4332(2)(C)(ii). *See Environmental Defense Fund v. Froehlke*, 473 F.2d at 351 (inadequate discussion failed to identify measures "to prevent easily avoidable environmental losses"). Here, the only recognition of cost or feasibility is that, whatever measures ultimately are implemented, neither the Forest Service nor MRI will pay for them. Pet. Br. 10 (local government should acquire critical parcels).[19]

The rule of reason clearly requires more detailed discussion of mitigation measures critical to insuring that

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[19] The Government's repeated assertions that mitigation is "largely outside its control" (Pet. Br. 7, 32, n.32) ring hollow in the face of active efforts of other federal agencies to accomplish mitigation. Acquisition of replacement habitat has become a widely used technique to compensate for wildlife losses. *E.g., Environmental Defense Fund v. Hoffman*, 566 F.2d at 1063 (acquisition by Government); *Friends of the Earth v. Hintz*, 800 F.2d 822, 837 (9th Cir. 1986) (acquisition of replacement wetlands by applicant). But the Forest Service here gave no consideration to acquiring critical deer habitat (or requiring MRI to do so), even after the Washington Department of Game specified six specific parcels for acquisition. EIS ff. D-72. *See* 40 C.F.R. 1505.2(c) (Record of Decision must state whether "all practicable" mitigation measures were adopted, and explain reasons for rejecting measures).

The Government's hand-wringing is inconsistent with its recognition that CEQ regulations define mitigation "broadly" to include "virtually any technique that avoids, eliminates, ameliorates, or compensates for environmental harm." Pet. Br. 28 (citing 40 C.F.R. 1508.20). Even the need for legislation does not automatically place consideration of an otherwise promising alternative or mitigation measure beyond the rule of reason. *See, e.g., Environmental Defense Fund v. Hoffman, supra* (Congress authorized $7 million to buy up to 70,000 acres); *NRDC v. Morton*, 458 F.2d at 837; Pet. App. 9a.

a project's impacts are acceptable. Assertions that measures "will greatly reduce" adverse impacts or insure that state standards are met must be based on sound analysis, not mere hope. *Preservation Coalition v. Pierce, supra.* The history of success and failure of measures employed in similar circumstances can be helpful in evaluating both effectiveness and feasibility. *See, e.g., National Wildlife Federation v. U.S. Forest Service,* 592 F. Supp. 931, 943 (D. Or. 1984).[20] But unsupported promises of mitigation as the panacea for a project's severe impacts on valued resources, such as "alternative, non-polluting energy sources" (EIS 69), trivialize NEPA's mandate for "detailed" discussion of unavoidable impacts. 42 U.S.C. § 4332(2)(C)(ii). *See* 40 C.F.R. 1502.24 (requiring "professional [and] scientific integrity" in EIS analyses).[21]

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[20] *See also* Br. of *Amici Curiae* State of California, et al., 12 & n.8; Environmental Defense Fund, et al. (in Case No. 87-1704), App. D; American Planning Association (*citing* Forest Service study of mule deer impacts of Mineral King ski resort).

[21] The Government boldly claims (without supporting citation) that CEQ's regulations "preserve the agency's basic discretion under NEPA to determine in any particular case how far-ranging, thorough, or detailed the mitigation discussion should be." Pet. Br. 30. But NEPA provides no "basic discretion" to flaunt the "detailed statement" requirement by merely listing mitigation measures where full discussion is necessary to "insure that the agency has taken a 'hard look' at environmental consequences." Pet. Br. 21, *quoting Kleppe v. Sierra Club,* 427 U.S. at 410, n.21. The suggestion that NEPA provides discretion to discuss only the easy, noncontroversial issues is contrary to several CEQ regulations as well as to reason. *See, e.g.,* 40 C.F.R. 1500.1(b) ("NEPA documents must concentrate on the issues that are truly significant"); *id.* 1502.1 ("full . . . discussion of significant environmental impacts"); *id.* 1502.2(a) ("environmental impact statement shall be analytic"); *id.* 1502.2(b) ("[i]mpacts shall be discussed in proportion to their significance"); *id.* 1502.14(a) & (f) ("[r]igorously explore

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**2. Mere listing of mitigation measures frustrates NEPA's procedures for fully informed decisions.**

The issue is not whether mitigation must be considered but rather whether the "detailed statement" and "hard look" requirements mean more than merely listing measures. The Government contends that a mere list suffices here because "the detailed mitigation measures were not yet ripe for specification." Pet. Br. 31. The implied admission here is that a more detailed discussion is necessary – but that its absence now is justified by the promise of additional analysis in the later site plan "tier" of environmental review. We agree that a more detailed discussion is necessary, but we cannot accept the oft-stated but unproven assumptions that such discussion was premature or will ever occur in the future.

When the decisionmaker reads that "State air quality standards can be met with mitigation," EIS 145, he or she will conclude that unacceptable impacts are not "unavoidable." 42 U.S.C. 4332(2)(C)(ii). But when (as

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and objectively evaluate all reasonable alternatives" including "appropriate mitigation measures"); *id.* 1508.27(b)(4).

In a related attempt to inject discretion where none exists, the Government suggests (Pet. Br. 17) that holding the EIS mitigation discussion inadequate runs afoul of this Court's admonition that "[a]s *Vermont Yankee* made clear, NEPA does not require agencies to adopt any particular internal decision-making structure." *Baltimore Gas & Elec. Co.,* 462 U.S. at 100. *Vermont Yankee's* holding did not address the courts' authority to review an EIS for NEPA compliance; it was directed at the lower court's imposition, under the guise of NEPA, of rulemaking procedural requirements such as cross-examination. *See Vermont Yankee,* 435 U.S. at 548. *Vermont Yankee* limited NEPA's procedural reach to the preparation of an adequate EIS, and the court of appeals here required nothing more.

here) this critical assertion has no basis, the decisionmaker is invited to make a decision based on not only inadequate, but worse yet, incorrect, information. *See Coalition for Canyon Preservation v. Bowers*, 632 F.2d at 782 (EIS must give decisionmakers "sufficient data from which to draw their own conclusions").

Nor is the public assured of a fully informed decision when reliance is placed on mitigation opportunities of unproven or speculative effect. *See Vermont Yankee*, 435 U.S. at 558. The agency comments strikingly illustrate how NEPA's goals were frustrated by hiding the difficult issues behind a mitigation wish list.[22] In view of the total failure to develop measures to deal with the severe impacts to resources of great value, assess their probable effectiveness, or determine their cost and feasibility, it is

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[22] After reviewing the draft EIS, the U.S. Fish and Wildlife Service commented (EIS ff. D-72):

> The offsite mitigation involves local zoning changes to protect important wildlife habitats in the Methow Valley. The final statement should discuss how and when these zoning changes would be made.

The Environmental Protection Agency similarly noted (*id.*):

> [T]he DEIS discusses mitigation largely in terms of measures which could or should be taken, not what commitments have been or are likely to be made, or what measures may be required as contract conditions for construction and operation of the ski area.

The Washington State Department of Game requested that the Forest Service "identif[y] and protect[]" "key mule deer fawning areas." *Id.* The state agency also listed six specific areas that should be purchased to protect winter range. *Id.* But the Forest Service failed to identify (let alone protect) key fawning areas and made no effort to determine the availability or cost of the six specific winter range areas recommended for protection.



not surprising the Government implicitly concedes additional environmental review is required. Pet. Br. 31.[23]

The EIS identifies as a mitigation opportunity the formation of an "Air Quality Control Authority" by Okanogan County pursuant to state law. EIS 68. But the EIS does not explain how this would alleviate air pollution.[24] Instead, the mitigation list employs comforting and popular buzz words which raise more questions than they answer. For instance, what "alternative, non-polluting energy sources" does the Forest Service have in mind? EIS 69. What is the cost of energy efficient, "site development and project design," or "full weatheriz[ation]"? EIS 68. Will the County regulate to "restrict[] the number of fireplaces and wood stoves"? *Id.* Who will develop, adopt, and pay for "enforcement measures"? EIS 69. Above all, what is the basis for the EIS's unsupported promise that "State air quality standards can be met with mitigation"? This promise requires an 80

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[23] The Government refuses to concede that "absent the success of those [mitigation] measures, the project would be environmentally unacceptable." Pet. Br. 37, n.34. Yet the EIS demonstrates that without mitigation, air quality will degrade from nearly pure to levels more than five times and twenty times greater than ambient air quality and non-degradation standards, respectively. *See* p. 3 & n.4, *supra*. *If that is not "environmentally unacceptable," what is?*

[24] Because this measure involves only the transfer of regulatory authority from the state to the county, it is virtually certain that it would not fulfill the EIS's promise. Under Washington law, local air pollution control authorities have no more power than the state agency which regulates air pollution when there is no local regulatory authority. *See* RCW 70.94.331(1) & (6). Moreover, "emission performance standards for new wood stoves and the opacity levels for residential solid fuel burning devices shall be state-wide." RCW 70.94.380. More stringent standards by local authorities are prohibited. *Id.*

to 95 percent reduction in total suspended particulates, yet is given without foundation or analysis.[25]

Equally apparent is the need for, but absence of, a discussion of measures to mitigate impacts to the deer herd. For example, will the county use zoning to restrict private property rights in a way that provides any protection for the herd's critical habitat? What will be the cost of the tax incentives, conservation easements, and land acquisition intended to limit loss of the herd's habitat? Can the County raise the necessary funds, given the reluctance of the Forest Service to participate financially in deer mitigation (Pet. Br. 10)? How will it enforce an ordinance to restrict free-ranging dogs? Have measures similar to those listed in the EIS been effective elsewhere?

Unsubstantiated conclusions lacking analytic support are the clear signals of NEPA violations. "Conclusory and abbreviated" discussions trivialize NEPA, *Coalition for*

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[25] The EIS promise of compliance means that mitigation measures would reduce total suspended particulates from an estimated 842 ug/$m^3$ to less than the state ambient standard of 150 ug/$m^3$, an 82 percent reduction, *compare* EIS 66-67 (Table 9) with EIS 145, and would result in less particulate pollution than the non-degradation standard of 37 ug/$m^3$, more than a 95 percent reduction. No analysis is provided for these "pie in the sky" projection. Similarly, the promise to meet yet "stricter" county standards (EIS 68) would require even more effective mitigation measures, but is made with no explanation of the means for its fulfillment.

The Government may claim that the non-degradation standards do not apply because pollution from the ski hill alone will not trigger the "prevention of significant deterioration" permit requirements for a "major emitting facility." *See* 42 U.S.C. § 7475. But the issue of whether a permit is required is distinct from the issue of whether the standard will be violated. The permit system for major sources is one method, but not necessarily the only method, for achieving compliance with the non-degradation standard. *See Alabama Power Company v. Costle*, 636 F.2d 323, 362 (D.C. Cir. 1980).



*Canyon Preservation v. Bowers*, 632 F.2d at 782, n.3, and do not meet CEQ's call for "professional [and] scientific integrity," 40 C.F.R. 1502.24. The EIS stated its conclusions, but "[n]othing referred to any studies or to facts on which these [and other] conclusions were based." *Coalition for Canyon Preservation v. Bowers*, 632 F.2d at 782, n.3. *See also I-291 Why? Ass'n v. Burns*, 517 F.2d 1077, 1080-82 (2d Cir. 1975) (*per curiam*).[26]

Unfounded promises of effective mitigation further frustrate NEPA by obscuring the full risks and costs of proceeding with the project. *Alaska v. Andrus, supra; Preservation Coalition v. Pierce, supra*. Such promises deny the full information required for a well-considered decision. *Vermont Yankee*, 435 U.S. at 558. The Government contends that deferring mitigation analysis somehow enhances informed decisionmaking. Pet. Br. 38. But its justifications are unpersuasive and clash with CEQ's determination that avoiding the difficult issues is a certain invitation to later conflict and delay. 40 C.F.R. 1501.2.

### 3. The Forest Service has no plans for further review of off-site impacts and mitigation.

While boldly representing to this Court that all of the admittedly severe impacts will be minimized later through "tiered" analysis, Pet. Br. 31, 35, the Forest Service in fact intends no further review of the off-site mitigation issues either with the permits or the site plan with its accompanying "environmental assessment."

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[26] The Government characterizes the listing of mitigation as a "discussion" and even as "full discussion," Pet. Br. 31, 32. Webster's Seventh New Collegiate Dictionary defines "discuss" as: "to investigate by reasoning or argument; to present in detail, to talk about." The EIS's mere listing of mitigation measures, without any "reasoning," "argument," or "detail" cannot rightfully be termed a "discussion," let alone a "full discussion."

Because there will be no additional study of off-site mitigation, the Government's reliance on tiered review is wholly misplaced.

The Forest Service arguably had two remaining opportunities to analyze and implement mitigation measures when it decided to postpone addressing the "more serious" off-site impacts in the EIS. Pet. Br. 8. One would have been the special use permit process, and the second would be the future "tier" of NEPA review for the site plan. But the permits were issued with none of the promised study and mitigation of off-site impacts to air and deer, and the future "tier" of NEPA review is limited to on-site development only.[27]

The Forest Service conducted no second tier of NEPA review when it issued the permits in 1986. The off-site impacts and mitigation issues postponed in 1984 again were ignored. Nor do the permits themselves call for further study or conditions to minimize the off-site

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[27] A major theme of the Government's appeal is that the Ninth Circuit has imposed new and unwarranted procedural burdens beyond those commanded by NEPA. *E.g.*, Pet. Br.16, 19, 38. But several Ninth Circuit cases demonstrate that if the Forest Service subsequently performed the meaningful mitigation analysis omitted from the EIS, the court would have given the Government every opportunity to demonstrate its compliance with NEPA without requiring unnecessary procedures or paperwork or otherwise elevating form over substance. *See, e.g., SOCATS v. Clark*, 720 F.2d 1475, 1480-81 (9th Cir. 1983) (worst case analysis can be presented in environmental assessment rather than new or supplemental EIS), *cert. denied*, 469 U.S. 1928 (1984); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1025 (9th Cir. 1980) (*per curiam*) (Corps violated NEPA, but "deficiency has since been cured"); *id.* at 1027 (Kennedy, J., concurring); *Village of False Pass v. Clark*, 733 F.2d 605, 614 (9th Cir. 1984) (inadequate worst case analysis should not "halt all government action," if subsequent analysis comes early enough to "still be used to influence the agency's decision").



impacts, either on adjacent land to be developed by MRI or elsewhere throughout the valley. The only pertinent permit conditions pertain to mitigation of the less severe "direct" impacts of the ski facilities on Sandy Butte. *See* pp. 8-10, *supra*. Indeed, the Government claims that off-site mitigation analysis was premature in 1984, Pet. Br. 17, but by 1986 the Forest Service ruled it was too late! *See* n.10, *supra*.

Nor will the site plan provide the promised second tier of review for off-site mitigation. The site plan will be used merely to determine the layout of structures such as ski lifts and a day lodge on the 3,900 acres on Sandy Butte managed by the Forest Service. *See* EIS 13. Review then will be limited to items such as how to lay out ski runs to avoid soil erosion into creeks and where to locate service roads to avoid water sources and fawning grounds. *See* EIS 16. Any environmental assessment will be limited to these site specific concerns. The Government does not explain how review of the Sandy Butte site plan has any bearing on the broader off-site issues implicated by the Regional Forester's 1984 decision to proceed with the project.

The court of appeals correctly recognized reliance on future review that will not address off-site impacts as an impermissible attempt to "act now and deal with the environmental consequences later." Pet. App. 17a. That they never will be dealt with at all lays bare the emptiness of the promises that mitigation "will" be effective.

The claim that it is too early to discuss off-site mitigation until the site plan and secondary development patterns are established is equally unconvincing. Pet. Br. 7-8, 17, 35; MRI Br. 21, 11-18, 27.[28] By then, of course, it

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[28] MRI suggests that mitigation analysis be deferred even beyond the site plan stage until specific proposals for off-site development are made. MRI Br. 7, 18.

will be too late for the Forest Service to alter its basic decision. *See Port of Astoria v. Hodel*, 595 F.2d 467, 478 (9th Cir. 1979) (analysis "should occur at an early stage when alternative courses of action are still possible and environmental damage can be mitigated"). Moreover, the contention is based on a fundamental misconception of what information is needed to develop and assess mitigation.

As the Washington Department of Game emphasized, *supra* pp. 4-5, what is needed is baseline data regarding mule deer habitat. Even MRI concedes that there was no reason why this information was unavailable, MRI Br. 27, other than the Government's refusal to gather the data. With this basic baseline data, reasonable forecasts regarding the need, cost, effectiveness, and likelihood of mitigation can be made well in advance of specific proposals for "secondary" development.[29]

That the site plan and knowledge of secondary development patterns are not necessary to help the Forest

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[29] For example, *amicus curiae* Northwest Forest Resource Council points out that most federally owned or managed land is in the western United States. Br. 4-5. This holds true for the project area as well, where the United States has large holdings within the Okanogan National Forest, North Cascades National Park, and two wilderness areas. If the recent deer study finds that primary migration routes and fawning areas are on federal lands, then the contention that full mitigation is beyond control of the United States (Pet. Br. 7) will be disproved. If the areas critical to deer are on non-federal lands which because of topography or distance from basic services are unlikely ever to be developed, then perhaps little or no mitigation is required. But if the critical areas coincide with lands having the greatest development potential, the need for effective mitigation and the difficulty (cost) of achieving it are at their greatest. The Washington Department of Game clearly was justified in requesting that the Forest Service obtain the basic baseline data, which is essential to a reasoned choice among alternatives and is available at reasonable cost. 40 C.F.R. 1502.22(a).



Service evaluate off-site mitigation opportunities is best demonstrated by the two studies that have proceeded in advance of these claimed necessary predicates. Analysis of the effectiveness of an air quality ordinance did not have to await a site plan. The EPA's recent assessment of the ineffectiveness of the County's air ordinance – without the benefit of a site plan – is proof of that.[30]

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[30] The Forest Service failed to take advantage of other readily available techniques to assess the air quality mitigation opportunities when it prepared the EIS. An examination of the model used to calculate the initial, unmitigated impacts demonstrates how readily the Forest Service could have evaluated the effect of various mitigation measures.

The model is described in Appendix H of the EIS. The key variable is the cumulative emission rate, "Q," which takes into account the number of housing units ("N"), the number of operating stoves per unit, ("R" and "T"), the amount of wood burned per stove ("W"), and the amount of particulates emitted from an individual stove ("E"). The impact of a mitigation measure ordinance establishing an emission performance standard for stoves could have been ascertained readily by adjusting variable "E," the emission rate for an individual stove. The impact of an ordinance providing for voluntary or mandatory shutdowns of stoves during inversions could have been ascertained readily by adjusting variable "T," the ratio of stoves in use to the total number of stoves. The effect of a zoning ordinance providing for less dense development could have been ascertained readily by adjusting variable "N," the number of housing units.

With a degree of exertion no greater than running additional Westlaw searches with different search words, successive computer runs could determine the extent to which these mitigation measures would be necessary, individually or collectively, to meet air quality standards. The Forest Service would then have some basis for ascertaining realistically whether the mitigation measures "will greatly reduce the impacts," EIS 67, and whether the county's air management plan could be expected to achieve compliance with air quality

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Similarly, MRI's acknowledgement (Br. 27) that "the purpose of the [recently completed deer] study is to establish existing conditions in the deer herd population, so that the impacts of secondary development can be handled effectively" confirms that this necessary baseline data could and should have been gathered and included in the EIS. 40 C.F.R. 1502.15 (EIS should describe existing environment); Tr. 412 (baseline data could have been obtained for EIS).

When the basic information is available and when future review will not occur, tiered review conflicts with NEPA's requirements. NEPA's mandate to consider environmental concerns "to the fullest extent possible," 42 U.S.C. § 4332, requires EIS preparation "early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made . . ." 40 C.F.R. 1502.5. *See also id.* 1500.1(b) & 1502.2(g); *Port of Astoria v. Hodel, supra.*

The Government's attempt to apply "tiered review" concepts to this case runs afoul of the stated purposes of CEQ's tiered review regulation. Delaying environmental review through tiering is permissible only "to eliminate repetitive discussion" and "to focus on the actual issues ripe for decision." 40 C.F.R. 1502.20. *See also* Pet. Br. 26, n.25 (*citing* 40 C.F.R. 1502.20 & 1508.28). The decision to defer discussion of mitigation for off-site impacts furthers neither of these objectives and is inconsistent with the latter. No one has suggested that the Forest Service must discuss off-site mitigation both now and again when the site plan is prepared. But deferring discussion of off-site

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standards "stricter than existing State standards." EIS 68. In the absence of such information, the EIS did not provide a reasonable discussion of mitigation measures and did not faithfully identify the "adverse environmental effects which cannot be avoided." 42 U.S.C. § 4332(2)(C)(ii).



mitigation opportunities is fundamentally inconsistent with the second objective, "focus[ing] on the actual issues ripe for decision."

The EIS failed to discuss mitigation when the Regional Forester most needed the information – prior to deciding whether to issue the permits. *See* 40 C.F.R. 1500.1(b) ("NEPA procedures *must* insure that environmental information is available . . . *before* decisions are made and *before* actions are taken") (emphasis added). As the Eighth Circuit explained in rejecting a contention (similar to that made here) that mitigation can await some future day:

> The proposed mitigation plans go to the very heart of the question before the Corps in preparing its [EIS] – whether the project should proceed at the present time in view of its environmental consequences.
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> * * *
>
> [T]he statement did not insure that the option of mitigation would not be prematurely foreclosed.

*Environmental Defense Fund v. Froehlke,* 473 F.2d at 351, 352.

Analyzing environmental concerns before decisions are made is necessary to insure that "decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." 40 C.F.R. 1501.2. The "decide now – plan later" approach is a sure invitation to conflict and delay. *See, e.g., Environmental Defense Fund v. Hoffman, supra* (flood control project delayed five years while Corps developed acceptable mitigation plan). Other parties are relying on the Forest Service's decision to proceed with this project in its current form and are making investments based on that decision.[31] If studies

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[31] For instance, the Forest Service's decision to issue the permit was interpreted by MRI and others as a commitment to proceed with this project which will lead MRI to make "a

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made after these irrevocable commitments cast doubt upon the effectiveness or feasibility of the listed mitigation opportunities, significant conflict and delay will result.[32]

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substantial investment" to develop detailed plans for the on-site development. *See* Pet. Br. 4, n.4. Other private landholders can be expected to make plans and investments in anticipation of the expected resort. State government and other federal agencies, as indicated by the memoranda of understanding, also anticipate committing staff resources as a result of the Forest Service decision.

[32] *Village of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984), demonstrates that the Ninth Circuit is supportive of phased review when used properly. Because a Congressionally mandated three phase process for leasing off-shore oil and gas lands made the pending exploration approval distinct from the subsequent development and production phases, and because an EIS would be prepared prior to the development and production approval, it was appropriate to defer consideration of impacts of large oil spills which are unique to the development and production phases.

In contrast here, there will be no further environmental review by the Forest Service of the off-site impacts or mitigation measures and the Forest Service already has committed itself to authorizing development and operation of the ski hill subject only to preparation of a site-specific development plan and other conditions unrelated to mitigating off-site impacts. *Compare Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Commission*, 449 F.2d 1109, 1128 (D.C. Cir. 1971) (not appropriate to defer review to "stage where corrective action may be so costly as to be impossible").

Although the Government insists that the ski area's "on-the-ground dimensions and form could not be determined until later stages in the planning process," Pet. Br. 17, it never explains why this is so. Development of a ski area may be a major undertaking, but it clearly is not of similar scope and

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**4. The Government attacks dicta but avoids the central issue.**

Unable to overcome the court's straightforward holding that the EIS's list of mitigation measures was inadequate, Pet. App. 17a-19a, the Government attempts to divert attention to statements by the court below not central to its decision. First, the Government attacks the court's dictum that "NEPA requires that 'actions be taken to mitigate the adverse effects of major federal actions'." Pet. Br. 16. The Government observes that respondents have not defended this statement, *id.* (*citing* Br. in Opp. 9), but this is because the court's holding was not based on it. The obligation to discuss mitigation comes from NEPA's directive that unavoidable impacts be discussed (42 U.S.C. § 4332(2)(C)(ii)), the CEQ regulations, and settled case law, not from a substantive duty.[33]

The Government similarly attacks the court of appeals' call for "a complete mitigation plan" to promote "an informed judgment as to the environmental impact of the project . . ." Pet. App. 19a. But the court of appeals' ruling was not premised on the absence of a "complete"

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magnitude as OCS leasing (involving thousands of square miles, not 3,900 acres) or the development of programmatic national energy policies. Those situations present legitimate questions of how "the life cycle of projects" affects NEPA compliance. *Warm Springs Dam Task Force*, 621 F.2d at 1027 (Kennedy, J., concurring). The question is presented here only because the Government casts about for justification to postpone addressing the difficult issues. That the "on-the-ground dimensions and form" of development of Sandy Butte are irrelevant to the severe, off-site impacts underscores this point.

[33] In any case, the court's statement is consistent with CEQ regulations. *See, e.g.*, 40 C.F.R. 1500.2(f) ("agencies shall . . . use all practicable means . . . to . . . minimize any possible adverse effects"). *See also Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. at 98 (substantive agency action subject to review under arbitrary and capricious standard).

plan. Instead, the court held that "an EIS must include a thorough discussion of measures to mitigate the adverse environmental impacts of a proposed action." Pet. App. 17a. This is hardly a novel proposition. *See, e.g., Environmental Defense Fund v. Froehlke,* 473 F.2d at 352 ("no practical reason why . . . thorough exploration of the possibility of mitigation" was not included in EIS).[34]

Simply put, the Government's concession that NEPA requires a reasonable discussion of mitigation disposes of this case. Pet. Br. 25. Because there is no basis for concluding that a mitigation "wish list" meets the "reasonable discussion" standard, the court of appeals correctly ruled the discussion of mitigation inadequate. Pet. App. 19a.[35]

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[34] The court made reference to a "complete mitigation plan" only in responding to the Forest Service's contention that mitigation measures would be developed later through the site plan process and the memoranda of understanding. Pet. App. 18a-19a. The court rejected this "decide now – plan later" approach because it left "the decisionmaker . . . unable to make an informed judgment as to the environmental impact of the project – one of the main purposes of an environmental impact statement." *Id.* 19a.

[35] In an appropriate case it may be that a "complete mitigation plan" should be developed and discussed in detail before committing to the project. Indeed, the Forest Service, petitioner here, was one of several "responsible critics" of its co-petitioner Secretary of the Army's flood control project urging that "a mitigation plan should be formulated and included as part of the project." *Environmental Defense Fund v. Froehlke,* 473 F.2d at 349 & n.7. *See also id.* at 351 & n.13 (several agencies "urged that no project be initiated *until a mitigation plan is actually put into effect* in order to prevent easily avoidable environmental losses") (emphasis in original). Mitigation packages are a well accepted means of developing environmentally acceptable alternatives for accomplishing the agency's objections. *See, e.g., Preservation Coalition v. Pierce,* 667 F.2d at 860-61 ("firm commitments" to "specific

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**B. The Forest Service must acknowledge uncertainty regarding mule deer impacts on remand.**

NEPA requires federal agencies to acknowledge when information is "incomplete or unavailable" in EIS discussions of "reasonably foreseeable significant impacts." Pet. Br. 41-42 (*quoting* current CEQ regulation at 40 C.F.R. 1502.22(b)). When (as here) proper study can be done at reasonable cost, the agency must do it. Pet. Br. 41 (*quoting* 40 C.F.R. 1502.22(a)). Petitioner's entire argument is directed at one sentence, completely distinct from the court's holding that the "cursory discussion" of deer impacts based on "incomplete information" was inadequate, in which the court called for a worst case analysis if "the new comprehensive study of the mule deer still provides incomplete information." Pet. App. 14a.[36]

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measures"); *Trout Unlimited v. Morton,* 509 F.2d at 1280 (noting incorporation of several mitigation measures into project through EIS).

Care should be taken also in defining the parameters of a "complete mitigation plan." A complete *plan* does not necessarily include detailed engineering diagrams or every section of an air quality or zoning ordinance. The level of detail in a "complete mitigation plan" should be commensurate with the level of project planning. The mitigation plan should always consider the effectiveness, expense, feasibility, and enforceability of mitigation measures – in broader terms in early phases of project planning and in more specific terms subsequently. *See* Brief of *Amicus Curiae* American Planning Association. The court's call for a "complete" mitigation plan was simply a directive to consider these factors, consistent with NEPA's command.

[36] The CEQ has made clear that its new regulation does not substantively change 40 C.F.R. 1502.22(*a*), governing cases (such as this) where the missing information is available. 51 Fed. Reg. 15,621 (1986). The Government's argument is directed entirely at the change in 40 C.F.R. 1502.22(*b*), which

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Because this "new comprehensive study" is intended to fill in the very gaps on which the court of appeals premised its holding, Pet. App. 11a-14a, the court's directive will become irrelevant should the ongoing study fulfill its promise to be "comprehensive." Accordingly, the question whether there is any meaningful distinction between assessment of low probability "catastrophic consequences" (new CEQ regulation) and "worst case analysis" (rescinded regulation) is better addressed in a future case where the distinction (if any) is claimed to affect the outcome.[37]

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*might* be relevant to further study but was *not* pertinent to the court's holding cited above.

MRI concedes that neither cost nor methodology precluded obtaining full information, instead attributing any uncertainty in assessing impacts to the herd "to the speculative nature of secondary impact analysis." MRI Br. 27. MRI's complaint about "the speculative nature of secondary impact analysis" (*id.*) confirms MRI's reliance on the discredited distinction between "primary" and "secondary" impacts. *See* pp. 21-22, *supra*.

[37] Contrary to the Government's statement that the "trail ends" at *Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983), Pet. Br. 42, uncertainty analysis has long been central to NEPA. *E.g., Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. at 100 ("all significant environmental risks to be factored into the decision"); *Alaska v. Andrus*, 580 F.2d at 473 ("cost of uncertainty" must be weighed); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d at 1023-24; *Brooks v. Volpe*, 350 F. Supp. 269, 279 (W.D. Wash. 1972) (requiring research to evaluate risks), *aff'd*, 487 F.2d 1344 (9th Cir. 1973). *See generally* Brief of *Amicus Curiae* Pacific Legal Foundation 8 (NEPA "unquestionably" requires that information gaps and uncertainty be addressed), 13-18.

As *amicus* Pacific Legal Foundation explains, CEQ changed the *methodology* for addressing uncertainty, not the requirement that it be addressed. *Id.* 12 ("no one knows how to do a worst

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The court of appeals' decision holding the EIS discussion of impacts on the mule deer herd inadequate was in full accord both with current CEQ regulations and with the Government's view of NEPA's requirements. *Compare* Pet. App. 11a-13a *with* Pet. Br. 37, n.35, 42-43. For example, the court held that NEPA involves "reasonable forecasting" but does not require an agency to "speculate" to "foresee the unforeseeable." Pet. App. 12a. *See* 40 C.F.R. 1508.8(b) ("indirect effects, which . . . are later in time or farther removed in distance, but are still reasonably foreseeable"); 40 C.F.R. 1502.22(b) (1986). The Government invokes the same authorities and language in explaining that NEPA requires " 'reasonable forecasting and speculation' concerning future environmental effects." Pet. Br. 42-43.

Similarly, the Government states that "a reasonably thorough discussion of the significant aspects of the probable environmental consequences is all that is required by an EIS." *Id.* at 43 (*quoting Trout Unlimited v. Morton*, 509 F.2d at 1283). Contrary to the claim that the court of appeals disregarded its own prior cases, Pet. Br. 43, the court relied on *Trout Unlimited* (*and* CEQ regulations) to explain why the central focus of the EIS should be on *significant* impacts rather than a semantic distinction

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case analysis"). The Government and MRI offer no reason to believe that the court of appeals will set aside an "uncertainty analysis" (PLF Br. 16) performed pursuant to the new rule. The absence of any indication that the court of appeals even considered whether the new regulation is significantly different from the old confirms the wisdom of this Court's reluctance to address issues not briefed or argued below. *See, e.g., Delta Air Lines v. Aigist*, 450 U.S. 346, 362 (1981). That CEQ explicitly resisted the attempt by commenters to set up a conflict between it and the Ninth Circuit further confirms that there is no ripe issue here regarding 40 C.F.R. 1502.22(b). Pet. Br. 43-44, n.41 (*quoting* 51 Fed. Reg. 15,625 (1986)).

between "primary" and "secondary" impacts. Pet. App. 11a.

The Ninth Circuit already had adopted virtually all of the limiting principles reflected in the new regulation. In *SOCATS v. Clark,* the district court's finding "that scientific uncertainty exists" was based on the Government's own experts' admissions and was not challenged on appeal. 720 F.2d at 1478-79. *See* 40 C.F.R. 1502.22(b) (analysis must be supported by "credible scientific evidence"); 51 Fed. Reg. 15,622-23 (1986) (CEQ explains that "credible" means "capable of being believed;" "credible scientific evidence" includes "responsible opposing views"). The court has called for "reasonable forecasting," not "unreasonable speculation." *Save Our Ecosystems v. Clark,* 747 F.2d 1240, 1245-46 (9th Cir. 1984) (citations omitted); Pet. App. 12a. *Compare* 40 C.F.R. 1502.22(b) (avoid "pure conjecture").

The Ninth Circuit repeatedly has refused to allow uncertainty analysis to be trivialized by demands for never-ending studies of overly speculative disasters. *See, e.g., Village of False Pass v. Clark,* 733 F.2d at 616 (analysis of 100,000 barrel oil spill not required where less catastrophic worst case was analyzed); *Oregon Environmental Council v. Kunzman,* 636 F. Supp. 632, 640 (D. Or. 1986) (agency not required to study more severe impacts), *aff'd,* 817 F.2d 484 (9th Cir. 1987).[38] *Compare* 40 C.F.R. 1502.22(b) (rule of reason).

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[38] These reasoned decisions demonstrate the hyperbole inherent in the assertion of *amicus* Institute of Law and Public Health Protection (Br. 20) that the courts are given to "subjective irrationality heavily skewed to favor anti-growth litigants."



The Ninth Circuit has required agencies to respond to "responsible scientific critics" who present "relevant information to a decisionmaker" regarding possible significant effects, "[e]ven if an event is unlikely." *Save Our Ecosystems v. Clark,* 747 F.2d at 1245, n.6. The court regularly has allowed agencies room to fashion their own procedures to enable them "to consider the scientific uncertainty in the least cumbersome manner." *SOCATS v. Clark,* 720 F.2d at 1480-81 (*citing Warm Springs Dam Task Force v. Gribble,* 621 F.2d at 1027 (Kennedy, J., concurring)); *Village of False Pass v. Clark, supra.* The almost *ad hominem* attack directed at Ninth Circuit judges by some[39] is unfair and unwarranted.

The Government's dire prediction of "severe consequences" resulting from the court's dictum is unfounded. Pet. Br. 45. Contrary to the Government's expressed fear that the court is directing the agency to engage in "pure conjecture . . . lacking a credible scientific basis," *id.,* the court carefully explained that such an analysis (if required at all) "is formulated on the basis of available information, using reasonable projections" of most severe impacts. Pet. App. 14a. This is precisely what CEQ's new regulation requires. 40 C.F.R. 1502.22(b) (1986) (analysis should summarize existing scientific information, applying "rule of reason").

## II. THE FOREST SERVICE MAY NOT ISSUE A SPECIAL USE PERMIT FOR RECREATIONAL USE OF NATIONAL FOREST LAND IN THE ABSENCE OF AN APPLICATION WHICH INCLUDES AN ADEQUATE MITIGATION PLAN

The Government complains that the court of appeals imported NEPA requirements into the Forest Service's regulatory framework. But the agency's substantive regulations requiring an applicant to prepare mitigation

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[39] *See, e.g.,* Brief of *Amicus Curiae* Northwest Forest Resource Council, et al., in Case No. 87-1704, at 4-7 & n.1.

"measures and plans" (36 C.F.R. 251.54(e)(4)) provided a golden opportunity to "[i]ntegrate the requirements of NEPA with other planning . . . procedures required by law or by agency practice so that all such procedures run concurrently." 40 C.F.R. 1500.2(c). Conversely, the EIS process is an excellent vehicle for developing the mitigation "terms and conditions" required by the agency's substantive regulations. 36 C.F.R. 251.56(a)(1)(ii). By missing these opportunities, the agency violated its own regulations as well as NEPA.

The Forest Service's regulations require that applications for special use permits include "measures and *plans* for the protection and rehabilitation of the environment during construction, operation, maintenance, and termination of the project . . . " 36 C.F.R. 251.54(e)(4) (emphasis supplied). The Regional Forester neglected his duty by approving an application which omitted the required "measures" and "plans." The Government quotes but does not address this regulation. Pet. Br. 45-49.

Applicants are required to submit mitigation plans so that the Regional Forester can fulfill the requirement that special use authorizations "*shall* contain . . . [t]erms and conditions which will . . . minimize damage to scenic and esthetic values and fish and wildlife habitat and othe[r]wise protect the environment." 36 C.F.R. 251.56(a)(1)(ii) (emphasis added). *See also* 36 C.F.R. 251.54(e)(3) & (5); *id.* 251.54(f). These regulations are substantive and clearly go beyond NEPA's essentially procedural mandate. The court's holding that it was arbitrary to issue permits in violation of these regulations is based on unambiguous language which is not subject to interpretation. *See, e.g., Burlington Northern Railroad Co. v. Oklahoma Tax Commission, et al.*, ___ U.S. ___, 107 S.Ct. 1855 (1987); *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The Government cannot explain the alleged difference between the court's call for an "adequate mitigation plan" (Pet. App. 5a, n.3)



and the regulation's call for "measures and plans for the protection . . . of the environment" (36 C.F.R. 251.54(e)(4)).

Contrary to the Government's assertion that the court's holding "runs roughshod" over the agency's interpretation of its regulation, Pet. Br. 49, the court limited its review to "an inquiry whether the proper factors were considered." Pet. App. 4a-5a.[40] Because the "vague," "undeveloped," and "wholly inadequate" list of mitigation possibilities fell so far short of the "measures and plans" required by the plain language of the regulations, the court of appeals was not "assure[d] that all [relevant] factors receive[d] the agency's attention." Pet. App. 5a-6a, nn.3&4, *quoting Save the Bay, Inc. v. Administrator of EPA*, 556 F.2d 1282, 1296 (5th Cir. 1977).

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[40] Moreover, the Government cites no "agency construction" or "administrative interpretation" to bolster the naked assertions of "consistent[]" and "routine[]" practice in issuing other permits. Pet. Br. 48, 49. Even consistent agency practice that is contrary to the plain language of the regulation is unlawful. *Yellin v. U.S.*, 374 U.S. 109 (1963); *Vitarelli v. Seaton*, 359 U.S. 535 (1959).

The Government also misstates the court of appeals' holding that issuance of the special use permits was arbitrary, capricious, and an abuse of discretion without an adequate mitigation plan. The court did not hold that a mitigation plan had to be "complete," *see* Pet. Br. 47, but rather "adequate." Pet. App. 5a, n.3. Nor did the court hold that the mitigation plan had to be prepared by the Forest Service. Pet. Br. 46. Instead, the court quoted the regulation requiring the applicant, *not* the Forest Service, to submit a plan "for the protection and rehabilitation of the environment" to support its holding that such a plan must "exist[]." Pet. App. 5a, n.3, *quoting* 36 C.F.R. 251.54(e)(4).

## CONCLUSION

The judgment of the court of appeals should be affirmed and the case remanded for further proceedings.

Respectfully submitted,

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NOVEMBER, 1988

# REPLY

# BRIEF

(15)

Supreme Court, U.S.
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No. 87-1703

# In the Supreme Court of the United States

OCTOBER TERM, 1988

F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE, ET AL., PETITIONERS

*v.*

METHOW VALLEY CITIZENS COUNCIL, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

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The government petitioned this Court for review here and in *Marsh* v. *Oregon Natural Resources Council,* No. 87-1704, primarily to resolve whether the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, requires federal agencies to include in every environmental impact statement a fully developed plan to mitigate environmental harm and a "worst case" analysis of potential environmental impacts. See 87-1703 Pet. I; 87-1704 Pet. I. This Court having granted the government's petitions, one might expect respondents to address those questions. Instead, respondents contend that these matters are not in issue (Resp. Br. 15, 16, 37-38) and offer alternative arguments in support of the court of appeals' result. This Court should accept respondents' refusal to defend the court of appeals' reasoning as a concession that it is indefensible. And the Court should reject respondents' alternative arguments because they too are unpersuasive.

1. Respondents describe the Methow Valley as a "remote," "pristine" area "blessed with a rich environment" that offers "an exceptional outdoors experience for visitors and residents alike" (Resp. Br. 1). But respondents' romantic brushstrokes have not captured the whole picture. As the *Early Winters Study* explains, this area is indeed attractive, but it has not gone untouched by man or time. In fact, the Methow Valley has many of the typical characteristics and problems of a rural community in the midst of increased growth and demographic change.[1]

As respondents observe, urbanization poses a "threat to wildlife habitat and air quality" (Resp. Br. 2), but the urbanization of Methow Valley has already begun and will continue regardless of whether MRI constructs the Early Winters Ski Area.[2] Respondents note that with construction of the ski resort, the local population "is projected to jump from 3,963 in 1984 to 7,221 in 2000" (Resp. Br. 2). But even with *no* ski area development, the local population is projected to increase to 5,194 during that period (*Early Winters Study* 20).

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[1] As the *Early Winters Study* explains (at 38-46), the Methow Valley is not free from commercial and industrial development, and, since the opening of a major state highway, "tourist-oriented businesses * * * have greatly increased in size and number" (*id.* at 38). The Methow Valley "has recorded a heavy in-migration since 1972" (*ibid.*). The forest products industry is a major element of the local economy, together with recreation, government, retail trade, services, agriculture, construction, and real estate (*id.* at 38-39). Nevertheless, unemployment "remain[s] high because in-migration has occurred faster than jobs are created" (*id.* at 39-40).

[2] See *Early Winters Study* 146 ("This transformation of private land from a rural setting to a more urbanized setting has already started and is likely to continue regardless of ski area development.").



Similarly, respondents observe that, absent local regulatory restrictions on woodstoves and fireplaces, "development spawned by the ski hill" will increase air pollution levels (Resp. Br. 3). But even now, the Methow Valley experiences seasonal air pollution episodes (*Early Winters Study* 27-29). And even with *no* ski area development, the projected increase in population (and associated woodstoves and fireplaces) would lead to violations of state air quality standards in the absence of local regulatory action (*id.* at 66-67).

In sum, respondents' idyllic portrayal of the Methow Valley is not entirely accurate, and the problems of increasing urbanization that the area faces are neither unique nor attributable solely to MRI's proposed ski development. Furthermore, many of the solutions necessarily—and properly—lie within the control of state and local elected officials. Indeed, state and local governments routinely address and resolve issues associated with economic and land use development in the regular course of their business.

2. As the government's opening brief explained (at 21-38), the court of appeals erred in concluding that NEPA requires environmental impact statements to include a complete plan for mitigating environmental damage. Respondents make no attempt to defend such a requirement. Instead, they assert that the court's express requirement of a " 'complete mitigation plan' " (Pet. App. 19a, quoting *Oregon Natural Resources Council* v. *Marsh*, 820 F.2d 1051, 1055 (9th Cir. 1987), cert. granted, No. 87-1704 (June 27, 1988)) is "dicta" (Resp. Br. 37) and that the government "avoids the central issue" in this case (*ibid.*). We disagree. The court of appeals' requirement, which was imposed both here and in *Marsh*, is plainly not dic-

tum.[3] Furthermore, one would expect that the "central issue" here is the question presented and accepted for review. See Sup. Ct. R. 21.1(a).[4] Respondents' refusal to address whether federal agencies must prepare a complete mitigation plan can only be interpreted as a confession that no such obligation exists.[5]

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[3] The court of appeals stated that "NEPA requires that 'action be taken to mitigate the adverse effects of major federal actions' " (Pet. App. 17a, (citation omitted)) and that "[c]onsequently, an EIS must include a thorough discussion of measures to mitigate the adverse environmental impacts of a proposed action" (*ibid.* (citing *Marsh*)). The court further stated that there must be "a detailed explanation" of mitigation measures (Pet. App. 18a) and that the *Early Winters Study* lacked "a detailed description" (*ibid.*). The court ultimately concluded that the mitigation plan is " 'a determinative factor in evaluating the adequacy of an environmental impact statement' " (*id.* at 19a (quoting *Marsh*)), that " '[w]ithout a *complete mitigation plan* the decisionmaker is unable to make an informed judgment' " (*ibid.* (emphasis added; quoting *Marsh*)), and that, accordingly, the *Early Winters Study*'s "discussion of mitigation measures is inadequate as a matter of law" (*ibid.*). Thus, respondents' argument that the court of appeals did not require either mitigation or a complete mitigation plan (Resp. Br. 37-38) is flatly contradicted by the court's reasoning and specific ruling.

[4] The government specifically petitioned this Court to decide whether NEPA "requires federal agencies to include in each environmental impact statement * * * a fully developed plan to mitigate environmental harm" (Pet. I). As the government's petition explained (at 14-18), the question warrants the Court's attention because the court of appeals' answer establishes a rule of law that is fundamentally incorrect (which respondents apparently concede) and establishes a precedent that, as a practical matter, would seriously frustrate or impede a wide range of federal and federally permitted projects.

[5] If we are correct in our contentions that the court of appeals erred in respect to the agency's substantive and procedural requirements regarding mitigation and worst case analysis, and erred as well with respect to the meaning of the Forest Service regulation (see Pet. Br. 45-49), then on remand the agency should be required to do no more than comply with the court of appeals' order that the agency provide further elaboration on the subject of alternatives and the project's impact on air quality in the Pasayten Wilderness Area—an order from which we did not seek review in this Court. See Pet. Br. 20 n.20, 50 n.51. Respondents insist that we over-read the court of appeals' opinion on the first two matters. We do not think so, but if the court of appeals may be understood as intending no novel and onerous obligations in respect to mitigation and worst case analysis, then there is no basis for further proceedings in the court of appeals on those matters since we have clearly complied with the usual NEPA requirements, as we have shown in our opening brief and here. And if we read the court of appeals correctly, and our challenge to that court's view of the law is found by this Court to be correct, then there also appears no occasion for further proceedings in the court of appeals.



Respondents attempt to defend the court of appeals' judgment on the ground that "NEPA requires federal agencies to discuss mitigation and address uncertainty" (Resp. Br. 17). As we explained in our opening brief (at 25), no one—including the government—has questioned that a federal agency can and should consider mitigation opportunities when assessing the environmental consequences of a proposed action. The crucial issue here is the role that mitigation considerations play in the agency's environmental review. We submit that NEPA (and the CEQ's implementing regulations) contemplate that the government will discuss mitigation in a manner that aids reasoned decisionmaking and, more specifically, that an agency "has broad discretion to determine the form and scope of the mitigation discussion in light of the particular circumstances, subject only to the requirements that the environmental review as a whole satisfies NEPA's specific requirements and that the resulting decision is not arbitrary or capricious" (*ibid.*). See *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97-98, 105-106 (1983). The question in this litigation

always has been to what extent—and not whether—mitigation must be discussed. Thus, respondents err when they portray our statement that federal agencies must "discuss mitigation in a manner that aids reasoned decisionmaking" (Pet. Br. 25) as a "concession that • • • disposes of this case" (Resp. Br. 38).

Respondents appear to accept this standard, or something close to it, in the abstract. They state that a "rule of reason" governs the adequacy of a mitigation discussion (Resp. Br. 19).[6] But the scope of the mitigation discussion respondents urge is inconsistent with both our standard and theirs, and is largely based on their failure to grasp either the purpose or the actual content of the *Early Winters Study*. The mitigation discussion that they seek is, as a practical matter, virtually impossible to achieve, and would contribute very little, at great cost, to NEPA's goal of informed decisionmaking.

The stated purpose of the *Early Winters Study* was to provide the Forest Service with "the information required to evaluate the potential for skiing at Early Winters, to assist in making a decision whether to issue a Special Use Permit for downhill skiing on all or a portion of [Sandy Butte]" (*Early Winters Study* 1). The *Study* accordingly discussed mitigation in the context of a general decision

[6] Respondents formulate the "rule of reason" as a standard for judicial review of agency action. See Resp. Br. 19-20. That contention sows confusion. This suit is cognizable under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and the APA itself sets forth the governing standards for judicial review. See 5 U.S.C. 706. In NEPA matters, the agency, and not the court, employs the "rule of reason" to determine—through a pragmatic assessment of need, feasibility, and value—the scope of its environmental inquiry. The court then reviews the agency's action, including its application of the "rule of reason," under the standards set forth in the APA. See 87-1704 Reply Br. 14-15.



*whether* to allow ski area development there. As we explained in our opening brief (at 32-38), the *Study*'s discussion of mitigation measures was general in content but it was extensive in scope. More importantly, it was appropriate for the decision at hand. Respondents categorically condemn the mitigation discussion as a "mere listing" (see Resp. Br. 5-7, 25-27) but fail to demonstrate in any concrete and practical way how the mitigation discussion could have been meaningfully improved. In particular, they fail to distinguish between on-site and off-site impacts, and they fail to recognize the different considerations that limit the scope of the mitigation discussion in each case.[7]

a. *On-site mitigation.* The *Early Winters Study* explained (at 16, 77) that specific measures to mitigate on-site mule deer impacts would have to await submission and review of a proposed ski area master development plan, but could include: locating facilities to minimize disturbance of wildlife wintering areas; restricting traffic on selected roads during fawning season; locating new roads away from fawning cover; and coordinating the master plan with mule deer migration routes (see Pet. Br. 32-33). The *Study* also described measures for mitigating the minor on-site air quality impacts arising from construction and operation of the ski area (see Pet. Br. 34).

Respondents fail to explain how—in the absence of a ski area master development proposal—*any* of these mitigation measures could be made more specific or their effectiveness assessed. A developer does not begin work on a master plan until he obtains a conditional special use permit, and it is the master plan that specifies the proposed location of "runs, lifts, roads, and other facilities"

[7] As we explained in our opening brief, on-site (or primary) impacts occur on the specific national forest lands occupied by the ski resort, and off-site (or secondary) impacts occur on other adjacent lands.

(*Early Winters Study* 16). Thus, a more detailed description and evaluation of the "on-the-ground" mitigation measures cannot begin until the post-permit stage of the planning process.[8]

As respondents recognize (Resp. Br. 30), the Forest Service will conduct a further review, pursuant to NEPA and in accordance with the conditions contained in the special use permit (Pet. Br. 4 n.4), before allowing the developer to proceed with construction.[9] The review at

[8] Respondents are mistaken in contending (Resp. Br. 4-5, 11, 32) that the information "needed to develop and assess mitigation" was "baseline data regarding mule deer habitat" (*id.* at 32). There was, in fact, adequate "baseline data." The *Early Winters Study* cited and relied upon (at 35, 36, 76, E6) two comprehensive studies of the local mule deer herds that describe population and habitat characteristics as well as migration routes and fawning areas. See D. Ziegler, *The Okanogan Mule Deer* (1978); D. Ziegler, *Biological Unit Management Plan for the Methow Deer Herds* (1975). (We will provide the Court with these studies upon request). The problem was in applying this information in the context of a yet-to-be developed ski area master plan. The *Early Winters Study* did not postpone its development of a mitigation plan because of an absence of baseline data, but rather because it could not identify specific on-site mitigation measures in the absence of the proposed ski area master development plan. Thus, the court of appeals erred in requiring, as part of its "complete mitigation plan," that the Forest Service must conduct further mule deer studies. See Pet. App. 12a-14a; see also Pet. Br. 20 n.20. The state authorities are presently conducting further mule deer studies that ultimately will be of assistance in implementing mitigation measures, but it was the need for the ski area master development plan, and not the absence of those studies, that prevented a more detailed statement of on-site mitigation measures.

[9] The Forest Service may conduct this review through an environmental assessment (40 C.F.R. 1501.3) or through an environmental impact statement (40 C.F.R. 1501.4), depending on the significance of the environmental considerations at that later stage of the process.



that second stage will discuss the actual on-site mitigation measures that have been incorporated into the master plan for ski development. Thus, the Forest Service will provide a more detailed discussion of mitigation at the appropriate "tier" of the decisionmaking process. The agency's systematic approach to discussion of on-site mitigation is plainly not "arbitrary or capricious" or, in respondents' terms, contrary to the "rule of reason."

b. *Off-site mitigation.* The *Early Winters Study* described "off-site" mitigation in general terms because those measures, which primarily respond to the proposed ski area's indirect encouragement of regional development and private land use, are not within the Forest Service's control. See *Early Winters Study* 1-3, 14, 65. The Forest Service has no authority, of course, to prescribe, prohibit, or control private activities on non-federal lands. Thus, when an agency decisionmaker evaluates whether to issue a special use permit, he reviews off-site mitigation information for the purpose of determining what actions the local governing authorities, which do have such power, *may* take to mitigate off-site effects. The *Early Winters Study*'s off-site mitigation discussion was designed to provide that type of needed information.[10]

For example, the *Early Winters Study* suggested (at 77-78) that off-site wildlife impacts could be mitigated through protective zoning, easements, and other regulatory actions. See Pet. Br. 33. The *Study* also suggested that off-site air quality impacts could be mitigated by developing an airshed management plan that would in-

[10] The Forest Service did not (as in the case of on-site mitigation) "defer" further discussion of off-site mitigation to a later stage of the decisionmaking process. Respondents' suggestion to that effect (Resp. Br. 21) is incorrect. Since the Forest Service has no control over off-site mitigation, there was no decision (and hence no discussion) on that matter to "defer."

corporate proven measures for reducing air pollution. In particular, the *Study* suggested (at 68-69) that the primary pollution source—fireplaces and woodstoves—could be regulated by restricting their number, establishing certification measures to assure proper performance, and imposing weatherization requirements on buildings to reduce the need to burn wood for heat. See Pet. Br. 34-35.

Here, as in the case of on-site mitigation, respondents offer no practicable suggestions for meaningful improvement of the *Early Winters Study*'s mitigation discussion. Obviously, all of these off-site measures are technically feasible and would mitigate wildlife impacts and reduce air pollution.[11] The controlling question is whether and to

[11] The *Early Winters Study* informed the Forest Service decisionmaker (at 145) that air quality standards could be met with mitigation, but it also indicated (at 1-3) that the local authorities would ultimately determine the extent to which mitigation measures would be imposed. Thus, respondents are mistaken in stating that the Forest Service "relied on the promise of effective mitigation measures" (Resp. Br. 7). Indeed, respondents are able to make that assertion only by omitting key words from the *Early Winters Study* passages that they quote. For example, the *Study* stated, "*Though State* air quality standards can be met with mitigation, *some air degradation would be unavoidable*" (*Early Winters Study* 145), and, "*The* numerous mitigation measures *discussed at the end of this section (Air Quality)* will greatly reduce the impacts *presented by this model*" (*id.* at 67) (emphasis added to words omitted from respondents' quotations at Resp. Br. 7). In any event, there is no merit to respondents' contention that the *Study* made an "unsupported promise that 'State air quality standards can be met with mitigation' " (Resp. Br. 27). Respondents overlook the fact that the local authorities can assure maintenance of the present level of air quality—which respondents describe as "virtually as clean as air can be" (*id.* at 3 n.4)—by simply prohibiting any future construction of fireplaces or wood stoves. As for respondents' contention that the *Study* relies on "popular buzz words" such as "weatheriz[ation]" (*id.* at 27), the *Study*'s language could hardly be plainer.



what extent the local public authorities would adopt them. But that is a matter that is beyond the Forest Service's (or the developer's) control. Thus, a detailed elaboration of *how* the local authorities might conduct mitigation would not materially assist a federal decisionmaker in deciding the precise question at issue; namely, "whether to issue a Special Use Permit for downhill skiing on all or a portion of [Sandy Butte]" (*Early Winters Study* 1).

Indeed, since the Forest Service cannot compel off-site mitigation, the discussion of those measures can in the end serve only to inform the federal decisionmaker about a particular uncertainty attendant upon the proposal. A decision to go forward is a decision that the contingency implicit in off-site mitigation is worth accepting in light of the overall benefits of the project. Respondents' repeated contention that the federal government can "do more" to develop off-site mitigation measures and assure that they are implemented is just a symptom of their underlying premise—which they deny—that NEPA imposes a substantive duty to mitigate environmental effects.[12]

[12] Respondents also argue (Resp. Br. 6, 27-28) that the Forest Service should attempt to predict what specific requirements the local authorities will ultimately choose to impose. This is not a proper subject for a federal agency to discuss in an environmental impact statement. The Forest Service can identify the formal actions that local authorities *are considering* or *have taken* (see, *e.g.*, *Early Winters Study* 70-71, L1-L3), but it cannot reasonably be expected to project what actions they *will take* in the future. There is no meaningful way to predict with any exactitude how individual government officials will exercise their prerogatives and political judgment in reaching a collective decision. The inquiry that respondents envision—which is not even "political" science—would require that the Forest Service engage in legislative mindreading. That sort of exercise in pure conjecture would be quite wasteful and would be more likely to mislead, than to aid, the federal decisionmaker and the public. Cf. *Metropolitan*

Respondents also complain (Resp. Br. 29-31) that the Forest Service normally does not revisit off-site mitigation in the subsequent "second tier" of environmental review. The Forest Service's reasons, however, should be apparent from the foregoing discussion. The Forest Service conducts the first tier of NEPA review to determine whether to issue a special use permit, and the agency decisionmaker takes the prospect of mitigation—including the fact that local authorities will determine the scope of off-site mitigation—into account in making his decision. The Forest Service conducts the second tier of NEPA review, however, for the specific purpose of evaluating whether the developer's proposed master plan for ski area development contains adequate on-site mitigation measures. The decisionmaker's focus here is on whether the *developer* has satisfied the conditions of his special use permit and should therefore be allowed to occupy the federal lands. Thus, there is no occasion for the federal decisionmaker to consider off-site mitigation at this tier. The resolution of off-site mitigation is not only beyond his control—as it was at the first tier—it is also not relevant to the particular decision at hand. The proper forum for further discussion of off-site mitigation lies with the local governing bodies who will make the relevant decisions.[13]

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*Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 776 (1983); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978).

[13] Respondents also assert (Resp. Br. 32-33 & n.30) that the fact that the Environmental Protection Agency, subsequent to the Forest Service's decision, was able to conduct an assessment of the County's air quality ordinance, or that the Forest Service could have conducted additional computer studies, demonstrates that more detailed mitigation measures could have been developed. Respondents again miss the point. The Forest Service cannot control what air quality ordinance the County will enact. Thus, these additional studies do not materially assist the federal decisionmaker in determining whether to grant a special use permit.



Respondents' objections to the *Early Winters Study*'s discussion of off-site mitigation is particularly unpersuasive here, where the Forest Service actually went beyond its NEPA disclosure obligations and affirmatively assisted the local government in identifying possible land use and air quality programs. The Forest Service has worked closely with the state and local government agencies throughout the planning process and—as the various memoranda of understanding indicate—will continue to do so in all future actions. See Pet. Br. 10-11 nn.13-14; *Early Winters Study* A1-A3, L1-L3. Thus, there is no merit to respondents' contention (Resp. Br. 17-18) that the Forest Service has transferred federal planning responsibilites to the state and local governments. Instead, the Forest Service has recognized that questions of state and local land use planning are necessarily—and properly—the province of state and local authorities. Indeed, respondents' position would convert NEPA into an instrument for imposing federal land use requirements on state lands.[14]

In sum, respondents are mistaken in contending that the *Early Winters Study* inadequately addressed off-site mitigation. Indeed, the First Circuit has twice held that similar,

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[14] As the actual experience in this case shows, there is no merit to amicus California's contention that the federal government's position "will diminish the ability of state agencies to obtain information about the real costs of mitigating federal actions" (California Amicus Br. 3). It is telling that neither Washington nor Oregon—the states involved in Nos. 87-1703 and 87-1704—has joined California's brief. Indeed, Washington state and local officials have participated in and endorsed the federal government's action here. See Pet. App. 66a. It also bears mention (since California has not revealed the fact) that California's counsel of record, prior to joining the California Attorney General's Office, was co-counsel for respondents in both the district court and the court of appeals. See 833 F.2d at 812.

but, far *less* detailed, discussions of secondary environmental impacts satisfy NEPA's requirements. See *Concerned Citizens on I-190* v. *Secretary of Transportation*, 641 F.2d 1, 5-6 (1981); *Cummington Preservation Comm.* v. *FAA*, 524 F.2d 241, 243-244 (1975).[13] The Forest Service properly limited its discussion in light of the fact that off-site mitigation is beyond its control. That

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[13] In *Concerned Citizens*, an environmental group sought to enjoin the construction of a highway, contending that the environmental impact statement failed to discuss adequately the impacts of secondary development. The environmental impact statement "treat[ed] future development as too remote and speculative to discuss in any detail" (641 F.2d at 5), observing that its significance " 'will depend on its amount, quality, and the ability of the community or region to channel such growth positively in accord with its goals' " (*ibid.*). The court of appeals held that the discussion was adequate, stating that " 'the highly speculative nature of the [projected] growth' and 'the existence of continuing opportunities to limit its adverse effects' renders [*sic*] the disclosure in this case at least minimally acceptable" (*id.* at 6).

In *Cummington Preservation Comm.*, an environmental group sought to enjoin the FAA from constructing a radar facility, arguing in part that the environmental impact statement failed to discuss adequately secondary development on surrounding private lands. The environmental impact statement observed that construction of the facility could encourage further development, but noted that " 'the ultimate development of the surrounding land is under the jurisdiction and control of the town in which it is located, through the residents themselves, the Selectmen, the Planning Board and other elected or appointed commissions.' " 524 F.2d at 244. The court of appeals held that this statement adequately identified the factors involved, noting that "it is not clear how much further the analysis could meaningfully be taken, so much being contingent upon unknown factors" (*ibid.*).

Thus, the Forest Service's discussion of secondary impacts and opportunities for their mitigation in the present case was far more extensive than in either *Concerned Citizens* or *Cummington Preservation Comm.*, and included Forest Service assistance and involvement in the local planning processes.



decision is neither "arbitrary or capricious" nor contrary to respondents' "rule of reason."

3. Respondents do not defend the court of appeals' instruction (Pet. App. 13a-14a & n.11) that the Forest Service must conduct "a 'worst case' analysis" pursuant to the rescinded CEQ regulation (*ibid.*) if the Forest Service encounters "incomplete information" on remand. Respondents simply argue instead that "[t]he Forest Service must acknowledge uncertainty" (Resp. Br. 39), and they appear to recognize that the CEQ's new regulation governing the evaluation of incomplete or unavailable information would be applicable. See Resp. Br. 41 n.37 (citation omitted) (stating that there is "no reason to believe that the court of appeals will set aside an 'uncertainty analysis' * * * performed pursuant to the new rule"). As we explain in our reply brief in *Marsh* (87-1704 Reply Br. 11 & n.8), the agency is entitled to apply the new regulation to environmental impact statements, commenced prior to May 27, 1986, that are "in progress" after that date. See 40 C.F.R. 1502.22(c). Since the court of appeals has ordered the Forest Service to supplement and amend the *Early Winters Study*, and such action will be necessary regardless of this Court's resolution of the case (see note 5, *supra*; Pet. Br. 20 n.20), the environmental impact statement here remains "in progress," and the agency is therefore entitled—if need arises to conduct any "uncertainty analysis"—to utilize the methodology set forth in the new regulation. In addition, we note a point that naturally arises from our foregoing discussion: by discussing the prospect for mitigation, the agency in fact addresses the problem of uncertainty.

4. Finally, respondents defend (Resp. Br. 43-45) the court of appeals' misinterpretation of the Forest Service regulation on the ground that it has provided the Forest Service with a "golden opportunity" (*id.* at 44) to integrate

NEPA requirements into the Forest Service's planning process. But as this Court has explained, the federal agencies have broad discretion to determine how to incorporate NEPA into their planning processes. See *Baltimore Gas & Elec. Co.*, 462 U.S. at 100-101. This is a judgment for the agency rather than the court of appeals. See *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 543-545.

Respondents' purported reliance on the regulation's language (Resp. Br. 44) fares no better. As respondents recognize (*ibid.*), the regulation provides that special use permits "shall contain: (1) Terms and conditions which will * * * (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and othe[r]wise protect the environment" (36 C.F.R. 251.56(a)(1)(ii)).[16] The regulation does not, by its terms, require the Forest Service to prepare a mitigation plan of any kind.[17] See Pet. Br. 45-49. As we explain (Pet. Br. 45), other Forest Service regulations do require a special use permit *applicant* to specify "measures and plans for the protection and rehabilitation of the environment during construction, operation, maintenance, and termination of the project" (36 C.F.R. 251.54(e)(4)). But contrary to respondents' argument (Resp. Br. 44-45)—which again is based on selective deletion of key words (see note 11, *supra*)—the regulation does not require the *Forest Service* to prepare a mitigation plan.

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[16] The Forest Service, in accordance with its normal practices, has included such conditions here. See Pet. Br. 46-47.

[17] Respondents contend (Resp. Br. 45 n.40) that the court of appeals did not require a "complete" but rather only an "adequate" mitigation plan, even though the court of appeals relied on the same reasoning that it employed in finding that NEPA requires a "complete" mitigation plan. See Pet. App. 9a n.3. It is apparent that the court of appeals concluded that a plan cannot be "adequate" (*ibid.*) unless it is "complete" (*id.* at 19a).



Thus, the court of appeals here, as in the case of its NEPA rulings, has imposed requirements on the agency beyond those required by law. Those requirements are unnecessary since, as we explain above (at 8-9), the Forest Service will conduct a further evaluation of on-site mitigation measures at the appropriate stage of the process. The result of the court of appeals' ruling would be a major delay—at great additional expense—in the beneficial use of federal lands.

For the reasons stated here and in our opening brief, the judgment of the court of appeals should be reversed with instructions to remand the case to the agency for further proceedings.

Respectfully submitted.

CHARLES FRIED
*Solicitor General*

DECEMBER 1988

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# AMICUS CURIAE

# BRIEF

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Nos. 87-1703 and 87-1704

In The

# Supreme Court of the United States

October Term, 1987

F. DALE ROBERTSON, *et al.*,

*Petitioners,*

v.

METHOW VALLEY CITIZENS COUNCIL, *et al.*,

*Respondents.*

JOHN O. MARSH, JR., *et al.*,

*Petitioners,*

v.

OREGON NATURAL RESOURCES COUNCIL, *et al.*,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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## MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

This motion of Pacific Legal Foundation (PLF) to file the annexed amicus curiae brief is respectfully made pursuant to Supreme Court Rule 36. Consent to the filing of this brief has been granted by all parties in *Marsh v.*

*Oregon Natural Resources Council,* No. 87-1704. However, consent was granted only by the Solicitor General and Methow Recreation, Inc., in *F. Dale Robertson v. Methow Valley Citizens Council,* No. 87-1703. Copies of consent letters have been lodged with the Clerk of this Court. Consent has been withheld by counsel for respondents, Methow Valley Citizens Council, *et al.*

## INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has litigated numerous public interest cases which involve environmental issues in general and the interpretation of the National Environmental Policy Act (NEPA) in particular. PLF policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board authorizes active PLF involvement in a case only when there is broad community support. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

## NEED FOR ADDITIONAL ARGUMENT

On July 6, 1984, PLF petitioned the Council on Environmental Quality (CEQ) to modify the "worst case analysis" requirement for environmental impact statements at 40 C.F.R. § 1502.22 (1979). After a lengthy analysis of the issue which included public review, CEQ announced in the *Federal Register* on April 25, 1986, that it had repealed the requirement and promulgated a new



regulation for the disclosure in an environmental impact statement of incomplete or unavailable information. The new regulation modifying Section 1502.22 became effective on May 27, 1986, and was supported by considerable evidence in the record that the "worst case analysis" requirement is an unproductive and ineffective method of achieving the goals of NEPA, 51 Fed. Reg. 15,620 (1986).

PLF believes the appellate court's imposition of a "worst case analysis" requirement in the two instant cases, after CEQ had rescinded the requirement and established a new regulation in its place, sets a dangerous precedent for appellate court activism, undermines the entire federal regulatory scheme, and establishes undesirable public policy. The serious nature of this dangerous precedent needs to be fully addressed, and PLF's brief does so. PLF's policy perspective and NEPA litigation experience, along with its prior participation in the rulemaking change of the "worst case analysis" requirement, will provide the Court a valuable additional viewpoint.

For the foregoing reasons, Pacific Legal Foundation requests that this motion to file the annexed amicus curiae brief be granted.

DATED: August 10, 1988.

Respectfully submitted,

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## AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS



## INTEREST OF AMICUS

The interest of amicus is set forth in the preceding motion for leave to file this brief.

## OPINIONS BELOW

The two opinions of the United States Court of Appeals are cited as *Methow Valley Citizens Council v. Regional Forester,* 833 F.2d 810 (9th Cir. 1987), and *Oregon Natural Resources Council v. Marsh,* 832 F.2d 1489 (9th Cir. 1987).

## STATEMENT OF THE CASE

*Marsh v. Oregon Natural Resources Council* involves the erection of a dam. In 1962, Congress authorized construction of three dams to control flooding of the Rogue River basin. Two of the dams are completed. The third, Elk Creek Dam, is not. Elk Creek is a tributary of Oregon's Rogue River. The Rogue River is designated as "wild and scenic" in the Wild and Scenic Rivers Act of 1968, Pub. L. No. 90-542, 82 Stat. 906, 16 U.S.C. § 1271.

Pursuant to the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, the United States Army Corps of Engineers (Corps) published a final environmental impact statement (EIS) in 1971 analyzing the impacts of the Elk Creek project. After studying the projected effects of the dam on turbidity in the Rogue River, the Corps filed a draft

supplemental EIS. Construction of the dam was suspended until completion of further water quality studies.

The Corps filed a revised draft supplemental EIS in 1980 which included turbidity and temperature projections based on the Corps' own observations and computer simulation models. The Corps' analysis was criticized as inadequate by state and federal agencies. The Corps responded to the criticisms and published its final supplemental EIS.

Subsequently the Oregon Natural Resources Council (Council) sued the Corps in federal District Court to enjoin the construction of Elk Creek Dam. The Council argued that the final supplemental EIS was inadequate in several respects. The District Court, however, found the EIS adequate and denied relief. Upon appeal to the Ninth Circuit, the court held, among other things, that the Corps' assessment of turbidity in the Rogue River due to the Elk Creek Dam was subject to uncertainty and therefore required a "worst case analysis." The court rejected the Corps' argument that this requirement ceased to apply when the "worst case analysis" regulation was rescinded on May 27, 1986. In Footnote 8 of its opinion the court referred to its own prior decision in *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1244 (9th Cir. 1984), and held the "worst case analysis" requirement remains in effect as a matter of case law.

In *Robertson v. Methow Valley Citizens Council*, Methow Recreation, Inc., applied to the United States Forest Service for a special use permit to develop and operate a year-round ski resort on the eastern side of the North Cascade Mountains in the State of Washington.



The proposed development is known as the Early Winters Project and would be located on Sandy Butte, a 3,900 acre parcel in the Okanogan National Forest, and on a large adjacent private parcel. Sandy Butte overlooks Methow Valley which provides winter range for Washington's largest migratory deer herd.

The United States Forest Service filed a final EIS in 1984 analyzing the impacts of designating Sandy Butte for use as a major ski area. Based on the EIS a special use permit was issued to Methow Recreation, Inc., for the Early Winters Project.

In December, 1985, Methow Valley Citizens Council filed suit in the Oregon District Court alleging, among others, violations of NEPA, due to an alleged inadequate EIS. The District Court upheld the adequacy of the EIS and the issuance of the special use permit. Methow Valley Citizens Council subsequently appealed to the Ninth Circuit. The appellate court reversed the District Court decision and ruled the EIS was inadequate. One of the deficiencies noted by the appellate court was the lack of a "worst case analysis." Citing its decision in *Marsh v. Oregon Natural Resources Council*, the court held that notwithstanding the fact that the Council on Environmental Quality (CEQ) had repealed the requirement for a "worst case analysis" one still must be provided in the face of incomplete information. In this case, the "worst case analysis" would be required on the impact of future development of Sandy Butte on the deer herds' migration route.

## SUMMARY OF THE ARGUMENT

NEPA common law unquestionably requires that gaps in information or uncertainty be addressed in an EIS. The cases which preceded CEQ's "worst case analysis" regulation did not specify a particular method for achieving this goal, however. It was only in deference to CEQ's regulation that courts began to require a "worst case analysis." After considerable experience with federal agencies' attempts to comply with the "worst case analysis" requirement, CEQ recognized that the regulation, as implemented, did not further the goals of NEPA. Accordingly, after appropriate rulemaking, CEQ amended its regulations and eliminated the "worst case analysis" requirement. The Ninth Circuit, however, ignored the fact that the "worst case analysis" requirement was strictly a creation of CEQ, one which CEQ could and did eliminate. Instead, it misconstrued the case law and found it to require the "worst case analysis" as a specific methodology for addressing both gaps in information and uncertainty.

When CEQ promulgated its innovative "worst case analysis" regulation in 1979 NEPA case law only required that decision makers weigh the costs of proceeding without more and better information by means of (1) reasonable forecasting, and (2) consideration of probabilities of the occurrence of environmental effects. The new CEQ regulation, which replaced the "worst case analysis" rule, meets these criteria. It directs the agency to evaluate all reasonably foreseeable significant adverse effects including those catastrophic impacts of low probability.

This Court has consistently required the lower courts to give "substantial deference" to CEQ's interpretation



of NEPA yet the Ninth Circuit has refused to follow this principle. Without any support in the statutory language, the legislative history, or the case law, the appellate court has mandated a "worst case analysis" method of uncertainty assessment in the EIS process. Such activist court decisions introduce uncertainty into the rulemaking process, invite litigation, and perpetuate a wasteful use of resources.

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## ARGUMENT

### I

### CEQ'S REVOCATION OF ITS "WORST CASE ANALYSIS" REQUIREMENT RECOGNIZED THAT NEPA'S GOALS WERE NOT BEING ADEQUATELY SERVED

NEPA was signed into law by President Nixon on January 1, 1970. It articulated national policy and goals, established CEQ, and required all federal agencies to assess the environmental impact of major federal actions significantly affecting the quality of the environment. A combination of agency practice, judicial decisions, and CEQ guidance resulted in the development of an environmental impact assessment process comprised of, among other things, the preparation of EISs for certain types of federal actions.

In 1977, CEQ was directed by Executive Order 11991 to promulgate binding regulations implementing the procedural provisions of NEPA. Specifically, CEQ was directed to

"'make the environmental impact statement more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives.'"

Accordingly, CEQ promulgated NEPA regulations on November 29, 1978. 40 C.F.R. §§ 1500-1508. The regulations became effective and binding on all federal agencies on November 30, 1979.

Since promulgation of the NEPA regulations, CEQ has periodically reviewed the regulations to identify areas where further interpretation or guidance is required. In recent years, CEQ received numerous requests from both government agencies and private parties to review 40 C.F.R. § 1502.22—the regulation describing the kind of analysis required in the EIS process when there is "incomplete or unavailable information." That regulation read:

"§ 1502 Incomplete or unavailable information.

"When an agency is evaluating significant adverse effects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.

"(a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

"(b) If (1) the information relevant to adverse impacts is essential to a reasoned choice among



alternatives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known (*e.g.*, the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence." 40 C.F.R. § 1502.22.

On August 11, 1983, CEQ proposed guidelines for the "worst case analysis" regulation and asked for comments. 48 Fed. Reg. 36,486 (1983). Some commenters advocated an amendment to the regulation. After reviewing the comments, CEQ withdrew its proposed guidance. 49 Fed. Reg. 4,803 (1984). On December 31, 1984, CEQ issued an Advance Notice of Proposed Rulemaking for 40 C.F.R. § 1502.22, solicited comments, and stated it would consider the need to amend the regulation. 49 Fed. Reg. 50,744.

On March 18, 1985, CEQ held a public hearing to discuss comments to the Advance Notice of Proposed Rulemaking. On August 9, 1985, CEQ reported its findings and proposed to amend the regulation. CEQ received 161 comments on the Advance Notice of Proposed Rulemaking: 68 from business and industry, 33 from public interest groups, 23 from federal agencies, 19 from individuals, 16 from state governments, and 2 from congressional interests. Many commenters "thought that either the regulation itself or recent judicial decisions from the U.S. Court of Appeals for the Ninth Circuit required

agencies to go beyond the 'rule of reason.'" 50 Fed. Reg. 32,236 (1985).

After a review of the regulation and the comments, CEQ concluded that the "worst case analysis" requirement was unsatisfactory. In its discussion of problems with the original regulation CEQ cited comments from experts in the field of risk analysis who stated that the "worst case analysis" lacks defensible rationale or procedures, and that the current regulatory language stands "'without any discernible link to the disciplines that have devoted so much thought and effort toward developing rational ways to cope with problems of uncertainty. It is, therefore, not surprising that no one knows how to do a worst case analysis. . .', Slovic, P., February 1, 1985, Response to ANPRM." 50 Fed. Reg. 32,236.

CEQ cited further problems with judicial interpretation of the "worst case analysis" requirement and specifically referenced the opinion of the Ninth Circuit in *Save Our Ecosystems v. Clark*, 747 F.2d 1240. In that case the Bureau of Land Management was ordered to prepare a "worst case analysis" assuming a causal effect between the use of certain herbicides on federal forest land and the development of cancer in human beings, despite the agency's contention that such an analysis would be pure guesswork because no credible scientific data supported the suggestion that cancer could occur at any dose. 50 Fed. Reg. 32,236.

Ultimately, CEQ concluded that the "worst case analysis," as interpreted by the courts, imposed a requirement on the agencies which went beyond the "rule of reason" because it required analysis of the "worst"



imaginable hypotheticals without regard to support from scientific opinion, evidence, or experience. For these reasons, CEQ repealed the "worst case analysis" regulation and replaced it with "a better approach." 50 Fed. Reg. 32,237.

> "[I]n our judgment, the proposed regulation is better designed to lead to more informed decisionmaking, and, thus, will be more helpful in preventing . . . low probability/high consequence disasters than the current 'worst case' rule. By requiring agencies to focus their analysis on reasonably foreseeable impacts, the proposal will generate information and discussion on those consequences of greatest concern to the public and of greatest relevance to the agency's decision. This will, we believe, constitute a substantial step forward over the current 'worst case analysis' approach." 50 Fed. Reg. 32,237.

## II

## PRIOR NEPA CASE LAW DID NOT REQUIRE A "WORST CASE ANALYSIS"

The Ninth Circuit misconstrued earlier NEPA decisions when it held, in the present cases, that the "worst case analysis" requirement of 40 C.F.R. § 1502.22 was a codification of prior NEPA case law. NEPA common law required only the adequate consideration of incomplete or unavailable information. It did not require the exact analysis detailed in the repealed CEQ regulation.

The appellate court relied on its own opinion in *Save Our Ecosystems* for the conclusion that the "worst case analysis" requirement was not new but rather a codification of prior case law. The holding in that case was ultimately predicated on *Sierra Club v. Sigler*, 695 F.2d 957

(5th Cir. 1983). A careful reading of *Sigler*, however, reveals a holding which does not support the conclusion of the Ninth Circuit in the instant cases. The *Sigler* court found that (1) prior case law required uncertainties to be addressed in environmental impact statements and (2) CEQ *could* require a "worst case analysis." But, contrary to the Ninth Circuit, the Fifth Circuit did not find that the "worst case analysis" regulation was the only method CEQ could impose to address incomplete or unavailable information.

The appellate court in *Sigler* traced the evolution of NEPA's common law on the issue of uncertainty and cited *State of Alaska v. Andrus*, 580 F.2d 465 (D.C. Cir. 1978), as indicating the state of the case law just prior to the promulgation of CEQ's "worst case analysis" regulation:

> "One of the costs that must be weighed by decisionmakers is the cost of uncertainty—*i.e.*, the costs of proceeding without more and better information. Where that cost has been considered, and where the responsible decisionmaker has decided that it is outweighed by the benefits of proceeding with the project without further delay, the courts may not substitute their judgment for that of the decisionmaker and insist that the project be delayed while more information is sought." *State of Alaska*, 580 F.2d at 473-74.

According to *Sigler* (the case ultimately relied upon by the Ninth Circuit) the federal cases which predated the 1979 "worst case analysis" regulation interpreted NEPA to require what could be termed an "uncertainty analysis," not a "worst case analysis." This Court should not be misled, as was seemingly the Ninth Circuit, by the fact that *Sigler* imposed a "worst case analysis" requirement on the United States Army Corps of Engineers. In



that case, the Corps argued that the catastrophic "worst case" oil spill analysis mandated by the regulation, involving a total cargo loss of a supertanker in Galveston Bay, was beyond the statutory minima of NEPA and therefore need not be performed. The *Sigler* court, therefore, focused on the question of whether the CEQ "worst case analysis" regulation was a permissible interpretation of NEPA. That court did not even try to address the question, answered in these cases affirmatively by the Ninth Circuit, whether a "worst case analysis" requirement is mandated by the statute.

When it published its decision on April 25, 1986, to rescind the "worst case analysis" regulation, CEQ responded to comments on the rule change, gave its own interpretation of the prior case law, and specifically cited *Sigler*.

> *"Comment*: Case law required worst case analysis prior to adoption of 40 CFR 1502.22.
>
> *"Response*: This assertion is incorrect. Case law prior to the adoption of 40 CFR 1502.22 *did* require agencies to make a 'good faith effort . . . to describe the reasonably foreseeable environmental impact(s)' of the proposal and alternatives to the proposal in the face of incomplete or unavailable information, consistent with the 'rule of reason.' *Scientists' Institute for Public Information v. Atomic Energy Commission*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). The 'worst case analysis' requirement was a technique adopted by CEQ as a means of achieving the goals enunciated in such case law. The 'worst case' requirement itself, however, was clearly a 'major innovation'. Comment, *New Rules for the NEPA Process: CEQ Establishes Uniform Procedures to Improve Implementation*, 9 Envt'l L.Rep. 10,005, 10,008 (1979). The U.S. Court of Appeals for the Fifth Circuit, interpreting the 'worst

case analysis' requirement for the first time in a litigation context, recognized that it was an innovation of CEQ. *Sierra Club v. Sigler,* 695 F.2d 957, 972 (5th Cir. 1983). CEQ has since observed difficulties with the technique of 'worst case analysis' and is replacing it with a better approach to the problem of incomplete or unavailable information in an EIS." 51 Fed. Reg. 15,625 (1986) (emphasis in original).

It is clear that CEQ did not interpret the case law to require a "worst case analysis" when it promulgated the requirement in 1979. Nor did CEQ consider itself to have contradicted the case law when, in 1986, it replaced the "worst case analysis" with a better approach to the problem of uncertainty. It is equally clear that the *Sigler* court did not interpet the *case law* to require a "worst case analysis." *Sigler* cannot be read, as the Ninth Circuit does, to suggest that the "worst case analysis" requirement is a mere codification of prior case law when *Sigler* expressly referenced the requirement as an "innovation."

The "worst case analysis" is only a means to an end. It is not the end itself. To the extent that the "worst case analysis" is a codification of prior case law, it embodies the common law concept of "uncertainty analysis." But, it is only *a* method, *a* technique, for implementing the concept. CEQ has promulgated a new approach. The Court of Appeals for the Ninth Circuit should not be allowed to impose its own method of "uncertainty analysis" on federal agencies based on such an obvious misconception of the case law.



## III

## THE NEW CEQ REGULATION TRACKS PRIOR NEPA CASE LAW

After noting that NEPA is silent on the problem of uncertainty resulting from missing information, the Fifth Circuit summarized in *Sigler* the early NEPA case law on the issue of incomplete or unavailable data and revealed two elements essential to an uncertainty analysis:

> "'[O]ne of the functions of a NEPA statement is to indicate the extent to which environmental effects are essentially unknown. It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. *Reasonable forecasting* and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as "crystal ball inquiry." "The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible • • • ." But implicit in this rule of reason is the overriding statutory duty of compliance with impact statement procedures to the "fullest extent possible."'
>
> "*Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission,* 481 F.2d 1079, 1092 (D.C.Cir.1973) (footnotes omitted). The EIS also must consider the *probabilities of the occurrence* of any environmental effects it discusses when it evaluates their environmental impact. *E.g., Carolina Environmental Study Group v. United States,* 510 F.2d 796, 799 (D.C.Cir.1975)." *Sigler,* 695 F.2d at 970 (emphasis added).

According to *Sigler,* the prior NEPA case law required the issue of uncertainty to be addressed with

(1) "reasonable forecasting" and (2) a consideration of the "probabilities of occurrence" of environmental effects. There can be no doubt that the new CEQ regulation meets these criteria. It reads in pertinent part:

> "§ 1502.22. *Incomplete or unavailable information.*
>
> "When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.
>
> "(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.
>
> "(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement: (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purpose of this section, 'reasonably foreseeable' includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the



> impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason." 40 C.F.R. §§ 1502.22(a) and 1502.22(b) (emphasis added).

This new regulation, which replaced the "worst case analysis," clearly meets the standard established by prior NEPA case law as noted by *Sigler*. "Reasonable forecasting" is required by the regulations' mandate that an agency evaluate "reasonably foreseeable" significant adverse effects on the human environment. The requirement to consider the "probabilities of occurrence" is necessarily inferred from the language of the regulation which defines "reasonably foreseeable" to include, among others, catastrophic impacts even if their "probability of occurrence" is low.

To the extent that CEQ regulations must comport with prior NEPA case law, the current regulation does so. Title 40 Code of Federal Regulations § 1502.22 tracks NEPA common law and orders that uncertain impacts from missing information be assessed by means of reasonable forecasting and consideration of the probabilities of occurrence, and not by any "worst case analysis."

## IV

## THE NINTH CIRCUIT DID NOT GIVE SUBSTANTIAL DEFERENCE TO CEQ'S NEW REGULATION

In *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979), this Court unanimously declared that "CEQ's interpretation of NEPA is entitled to substantial deference." This standard was acknowledged and applied by the Ninth Circuit as long as CEQ's "worst case analysis" requirement

was in effect: "These [CEQ] regulations are binding on the BLM and entitled to substantial deference by the courts." *Save Our Ecosystems,* 747 F.2d at 1244. After CEQ repealed the "worst case analysis" requirement and replaced it with a new regulation, however, the Ninth Circuit refused to give it the deference the court previously determined was due.

In the present cases, the appellate court refused to defer to the new 40 C.F.R. § 1502.22 regulation, on incomplete or unavailable information, in any respect. Rather, the court dismissed the new regulation out of hand for a supposed conflict with prior NEPA case law.

> "We reject the argument of the Corps that section 1502.22 is inapplicable due to its rescission on May 27, 1986. The worst case regulation is a codification of prior NEPA case law. *See Save Our Ecosystems v. Clark,* 747 F.2d 1240, 1244 (9th Cir.1984). Thus, the rules embodied in the regulation remain in effect even though the regulation was rescinded." *Oregon Natural Resources Council v. Marsh,* 832 F.2d 1489, 1497 n.8 (9th Cir. 1987).

In *Sigler,* the Fifth Circuit cited language from *Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 371, 381 (1969), to indicate what substantial deference means in the context of NEPA: "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." The court went on to say, "[t]herefore, if the CEQ interprets NEPA as mandating a particular . . . analysis, the CEQ's interpretation is binding on this court and on agencies preparing EIS's unless it is shown that the interpretation conflicts with the language or legislative intent of NEPA or the teachings of the Supreme Court." *Sigler,* 695 F.2d at 972.



The Ninth Circuit, in the present cases, pointed to no compelling indications that the new regulation is wrong. The court concluded, without discussion, that the "worst case analysis" requirement applied as a matter of law and the new regulation did not. It has been shown that this conclusion was based on an egregious misreading of the applicable case law. Had the Ninth Circuit included within its analysis of the new regulation an assessment of the language and legislative intent of NEPA, as well as the teachings of the Supreme Court, as suggested by *Sigler,* it would have been compelled to defer to CEQ's interpretation of the statute.

In *Sigler,* the Fifth Circuit examined the language of the statute and found that "NEPA is silent on the problem of uncertainty resulting from missing information. . . ." *Sigler,* 695 F.2d at 970. The court held that NEPA's "literal language does not require a worst case analysis." *Id.* at 969. The court permitted itself to conclude only that "[w]e perceive some language in NEPA which *may* be said to endorse *generally* the *concept* of a worst case analysis. *See* 42 U.S.C. § 4331(b)(3) (responsibility of federal government to avoid 'unintended' consequences of environmental use), 4332(C) (EIS to disclose all environmental impacts)." *Id.* at 969 (emphasis added). The Fifth Circuit found no NEPA mandate for a "worst case analysis." Nor did it find NEPA to preclude any other analysis which would meet the goal of NEPA to avoid unintended consequences and address environmental impacts. Clearly, the new regulation, which directs the disclosure and analysis of incomplete or unavailable

information relevant to all reasonably foreseeable significant impacts, meets these goals and may be said to be endorsed, generally, by NEPA.

With respect to the legislative intent of NEPA the *Sigler* court notes the following.

> "There is also some support for a worst case analysis in NEPA's legislative history which illustrates congressional awareness of man's limited understanding of the environmental consequences of his actions. *See* Senate Comm. on Interior and Insular Affairs, National Environmental Policy Act of 1969, S. Rep. No. 296, 91st Cong., 1st Sess. 9-10 (1969). Despite this awareness, Congress mandated full disclosure of environmental consequences, apparently leaving to the courts and the CEQ the determination of the extent of the mandate when information is missing and expensive, or impossible, to obtain." *Id.* at 970 n.9.

Just as a critical review of the prior case law reveals a distinction between NEPA's mandate for uncertainty assessment and the "worst case analysis" *method* of assessment, so does the legislative history make the difference apparent. The only support the *Sigler* court found in the legislative history, for the "worst case analysis," was the reference to "congressional awareness of man's limited understanding." It found no support for mandating a "worst case analysis" methodology. As *Sigler* points out, Congress mandated disclosure by a means which could be selected by CEQ. In 1979 CEQ chose the "worst case analysis" method for assessing missing information. In 1986 CEQ chose, in its own words, "a better approach to the problem of incomplete or unavailable information in an EIS." 51 Fed. Reg. 15,625.



This is not the first time this Court has had to decide whether to defer to CEQ's change in regulations. In the *Andrus* case, CEQ was changing its guidelines to require a "worst case analysis" for the first time. This Court concluded that a change in interpretation by CEQ is no reason to decline to defer to its new interpretation. Likewise, in the present cases, when CEQ has changed its regulations once again, this time to eliminate the "worst case analysis" requirement, this Court should not decline to defer to the new regulation.

The new 40 C.F.R. § 1502.22 regulation does not conflict with the language of NEPA. It does not conflict with the legislative intent. Nor does it conflict with the teachings of the Supreme Court. These conclusions should bind the Ninth Circuit to apply the CEQ regulation as it now stands and to dismiss its self-imposed requirement for a "worst case analysis" in an EIS.

## V

## THE NINTH CIRCUIT'S ARROGATION OF RULEMAKING AUTHORITY UNDERMINES THE ENTIRE FEDERAL REGULATORY SCHEME

If the Ninth Circuit is permitted to apply its own EIS rules rather than those properly promulgated by the responsible regulatory agency, and if it is permitted to do so in open contravention of NEPA case law, statutory language, and congressional intent, it will undermine not only the NEPA regulatory program but the entire federal regulatory scheme. In *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), this Court chose not to accept such a risk. In that case, the Court of Appeals had devised its own four part "balancing" test for determining when

an agency must begin an EIS. After noting that the "balancing" test found no support in either the language or legislative history of NEPA, this Court indicated that "the statute clearly states when an impact statement is required, and mentions nothing about a balancing of factors." This Court went on to suggest several more reasons why it could not adopt the appellate court's test: (1) It would leave the agencies uncertain as to their procedural duties; (2) it would invite litigation; and (3) it would result in the preparation of a good many unnecessary impact statements.

Unless this Court rejects the Ninth Circuit's unfounded conclusion that NEPA mandates a "worst case analysis" and no other, the same inevitable problems foreseen in *Kleppe* can be anticipated to result with equal certainty from the present cases. Federal agencies could not rely on federal rules with any assurance if federal courts were allowed to rewrite them whenever the courts determined the rules did not go as far as the courts wanted them to. It would invite considerable litigation in many areas of the law if the regulated community perceived that courts can set their own rules contrary to those established by the responsible agencies through the proper rulemaking process. Also, a good many unnecessary studies would be done with considerable expense and delay to comply with the "worst case analysis" requirement in an EIS.

It is bad law and poor public policy that allows the courts to displace agency regulations without compelling indications that the regulations are wrong. In the present cases the Ninth Circuit made no such showing. The court



has foisted its own ideas on the regulated community with flagrant disregard for the decisions of the federal agency which is designated to interpret national environmental policy and directed to promulgate binding regulations under NEPA.

## CONCLUSION

This Court should not permit the Ninth Circuit to displace properly enacted interpretive rules with its own conception of national environmental policy. It is against the public interest for the courts to circumvent the well considered decisions of the administrative agency and to continue to apply annulled rules which have been demonstrated to be counterproductive to the goals of the overriding statute. For the reasons stated above, this Court should rule for petitioners.

DATED: August, 1988.

Respectfully submitted,

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# AMICUS CURIAE

# BRIEF

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NO. 87-1703, 87-1704

IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1988

F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE, *et al.*,
*Appellants,*

v.

METHOW VALLEY CITIZENS COUNCIL, *et al.*,
*Appellees.*

JOHN O. MARSH JR., SECRETARY OF THE ARMY, *et al.*,
*Appellant,*

v.

THE OREGON NATURAL RESOURCES, COUNCIL, *et al.*,
*Appellees.*

**On Appeal from the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF THE INSTITUTE OF LAW AND PUBLIC HEALTH PROTECTION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1988

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**No. 87-1703**
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F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE, *et al.*,
*Appellants,*

v.

METHOW VALLEY CITIZENS COUNCIL, *et al.*,
*Appellees.*

and

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---

**On Appeal from the United States Court of Appeals for the Ninth Circuit**

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## BRIEF OF THE INSTITUTE OF LAW AND PUBLIC HEALTH PROTECTION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

---

### INTEREST OF *AMICUS*

The Institute of Law and Public Health Protection (Institute) is a non-profit corporation organized under the laws of the Commonwealth of Virginia. The Institute is devoted to the attainment of adequate protection of public health and the environment in the United States and throughout the world. Its officers, directors and members include prominent legal educators in the United States, Europe, Africa, Asia and

Australia, State and Federal officials, medical and health care experts, and corporate executives concerned with effective environmental and health protection regulation. To these ends, the Institute is concerned with environmental and public health policy, the reform and improvement of substantive environmental law, the proper enforcement of such law by the responsible governmental entities, and with the nature of the federal courts' review of governmental decisions. When permitted by court rules and practice, the Institute files briefs as *amicus curiae* in litigation involving significant public health and environmental law issues.

The case at bar involves questions fundamental to the effective implementation of the National Environmental Policy Act (NEPA), a statute having significant importance in the protection of the environment. These issues include:

1. Whether, under the Constitution, the President, absent delegation of any authority by Congress, has inherent legislative power to authorize the Council on Environmental Quality (CEQ) by means of an executive order to promulgate legally binding legislative-type rules, *i.e.* the CEQ Regulations, 40 C.F.R. Parts 1500-1508 (July 1, 1986);

2. Whether Congress when it enacted the NEPA intended to establish and impose a requirement for "worst case analysis" upon federal decision makers, and if not, whether federal courts may lawfully "create" such a requirement based upon the "common law" of the NEPA.

Through their counsel, the parties to these proceedings have consented to the appearance of this Amicus.

## SUMMARY OF ARGUMENT

If the President does not have the power either (1) under the Constitution or (2) by virtue of authority delegated by Congress to authorize the CEQ to promulgate legally binding legislative type rules, then the CEQ Regulations For Implementing The Procedural Provisions of the National Environmental Policy Act, 40 C.F.R. Parts 1500-1508, are not valid and the "worst case analysis" regulation (Section 1502.22) was not legally binding or enforceable, and the



judicial decisions based thereon and specifically the decisions of the Court of Appeals for the Ninth Circuit in the cases at bar must be reversed.

There are only two possible sources for the power that President Carter purported to exercise when on May 24, 1977, he issued Executive Order 11991 to empower the CEQ to promulgate these regulations. One source is the Congress. Article I, Section 1, provides that "All legislative powers herein granted shall be vested in a Congress ... ." But, as shown hereafter in Part I, in none of the legislation upon which the President purported to base Executive Order 11991 did Congress authorize the President or delegate legislative power either directly or indirectly to the President or the CEQ to promulgate legislative type regulations to implement the procedural provisions of the NEPA.

The other possible source of legal authority for Executive Order 11991 and the CEQ Regulations is the Constitution itself -- either some explicit grant of power to the President or some implied authority inherent in the Constitutional powers granted to the Executive Branch. As shown hereafter in Part II, there is no such explicit grant of power to the President in the Constitution and the inherent authority of the President to administer the Executive Branch and to "take Care that the Laws be faithfully executed ..." pursuant to Article II, Section 3 of the Constitution, falls short of constituting implied power adequate to authorize the CEQ to promulgate binding legislative type rules to implement the NEPA.

Absent either statutory delegation or constitutional power to support Executive Order 11991, it has no legal effect, *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), and the CEQ Regulations promulgated under the authority of the Executive Order therefore do not have any binding effect.

Finally, assuming *arguendo* that this Court concludes that Congress has acquiesced by silence and/or inactivity to the presidential exercise of legislative authority in Executive Order 11991, the scope of that Authority cannot in any event exceed the scope of the NEPA itself and the CEQ regulations cannot

lawfully impose requirements that exceed the provisions of the NEPA. As shown hereafter in Part III, there is no statutory basis for the "worst case analysis" regulation. Accordingly, the regulation, and its successor, are *ultra vires*, void and unenforceable.

## ARGUMENT

### I
### CONGRESS HAS NOT DELEGATED AUTHORITY TO THE PRESIDENT EMPOWERING HIM TO AUTHORIZE THE CEQ TO PROMULGATE BINDING LEGISLATIVE TYPE RULES TO GOVERN IMPLEMENTATION OF THE PROCEDURAL PROVISIONS OF NEPA.

The preamble to Executive Order 11991 states the claimed legal basis upon which it was promulgated:

> By virtue of the authority vested in me by the Constitution and statutes of the United States of America, and as President of the United States of America, in furtherance of the purpose and policy of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), the Environmental Quality Improvement Act of 1970 (42 U.S.C. 4371 *et seq.*), and Section 309 of the Clean Air Act, as amended (42 U.S.C. 1857h-7), it is hereby ordered as follows ...

None of the statutes enumerated in this preamble delegated authority to the President to authorize the CEQ to promulgate legally binding legislative type regulations to govern the implementation of the procedural provisions of the NEPA.

#### A. The National Environmental Policy Act Of 1969

The Council on Environmental Quality (CEQ), created by the provisions of Title II of the NEPA, was intended to act in an advisory not regulatory capacity. The CEQ was patterned



closely upon the Council of Economic Advisors established by the Full Employment Act of 1946. U.S. Congress, National Environmental Policy Act of 1969, Senate Committee Report 91-296, July 9, 1969. Congress stopped short of granting any authority to the CEQ to control or veto the activities of other agencies.

In fact, Congress expressly considered and rejected grant of such authority to the CEQ. Congress rejected the original version of Section 102(2)(B), which would have provided for CEQ "review and approval" of federal agency methods for giving "appropriate consideration to presently unquantified environmental amenities and values." Instead Congress substituted the weakened requirement for mere agency "consultation" with the CEQ.

The limited advisory powers Congress intended for the CEQ are indicated by Section 202 of the NEPA which provides that the President shall designate as members of the CEQ persons who as a result of training, experience, and attainments, are:

> ...exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in Title I of this Act; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and *recommend* national policies to promote the improvement of the quality of the environment.

*Emphasis added.*

Section 204 of the NEPA lists the eight specific duties and functions that Congress empowered the CEQ to perform. These duties and functions are confined, *inter alia*, to advising the President, to gathering "timely and authoritative information concerning conditions and trends in the quality of the environment," to conducting "investigations, studies, surveys, research and analysis relating to ecological systems and environmental quality" for the purpose of reporting "at least

once each year to the President on the state and condition of the environment," and to "*advise* " and "make *recommendations* to the President ... " on the environment. (*Emphasis added.*) Thus, both the language of the NEPA and its legislative history clearly establish that Congress did not intend the CEQ to be a regulatory agency. *See* Conf Rep No. 91-765, 91st Cong., 1st Sess., *reprinted in* 1969 U.S. Code Cong. & Admin. News, 2771-2773. Congress delegated no regulatory authority whatsoever to the CEQ in the NEPA:

> The purpose of the bill, as hereby reported, is to create a Council on Environmental Quality with a broad and independent overview of current and long-term trends in the quality of our national environment, to *advise* the President and through him the Congress, and the American People on steps which *may and should* be taken to improve the quality of that environment.

House Report No. 91-378, *to accompany* H.R. 12549, p. 1, July 11, 1969. (*Emphasis added.*)

### B. The Environmental Quality Improvement Act

Congress enacted the Environmental Quality Improvement Act of 1970, 42 U.S.C. 4371-4374, 1970, (EQIA), to create within the Executive Office of the President an Office of Environmental Quality (Office). This legislation did not delegate any regulatory authority or authorize either the CEQ or the Office to promulgate binding legislative type rules to implement the NEPA. The EQIA merely created the Office to "provide the professional and administrative staff for the Council on Environmental Quality established by Public Law 91-190 [NEPA]." Section 203(d) of the EQIA enumerates the seven specific functions and duties of the Office. These duties and functions are confined, *inter alia*, to providing "professional and administrative staff and support" for the CEQ, to reviewing the "adequacy of existing systems for monitoring and predicting environmental changes in order to achieve effective coverage and efficient use of research facilities and other resources," to promoting "the advancement of



scientific knowledge ... to prevent or reduce adverse effects that endanger the health and well-being of man ... ," and to "collecting, collating, analyzing and interpreting data ... ." Moreover, the power of the Office and the CEQ in dealing with "Federal agencies and departments" is explicitly confined by this legislation to "assisting" such agencies in various environmental activities. § 203(d)(2).

### C. The Clean Air Act, Section 309

Section 309 of the Clean Air Act, 42 U.S.C. Section 7609 (1970), does not delegate *any* authority to the CEQ. Section 309 directs the Administrator of the Environmental Protection Agency (EPA) to "review and comment in writing on the environmental impact ... " of proposed Federal legislation, of newly authorized Federal projects to which Section 102(2)(c) of NEPA applies, and regulations proposed by any department or agency of the Federal government. The sole reference to the CEQ is set forth in Section 309(b) which provides that matters that EPA finds "unsatisfactory" shall be "referred to the Council on Environmental Quality."

Because of the limitations of the above statutory provisions, President Nixon, by Executive Order No. 11514, 3 C.F.R. § 902 (1970), authorized and directed the CEQ to adopt and publish "guidelines" to assist Federal agencies in the preparation of adequate environmental impact statements (EISs). Based on this executive order "Interim Guidelines" were published in 1970, 35 Fed. Reg. 7391 (1970), and "Guidelines" in 1971, 36 Fed. Reg. 7724 (1971). Thereafter, the CEQ published a later version as "Proposed Guidelines," 38 Fed. Reg. 10856 (1973), which led to the "Final Guidelines," 38 Fed. Reg. 20550 (1973). These Guidelines did not claim to be binding, but purported merely to provide guidance to assist federal agencies to comply with Section 102(2)(C) of NEPA (42 U.S.C. § 4332(2)(C)), the provisions governing preparation of environmental impact statements. Some courts accorded "persuasive" authority to the Guidelines. *See, e.g., Scientists' Institute for Public Information* v. *Atomic Energy Commission*, 481 F.2d 1079, 1088 (D.C. Cir. 1973). This Court referred to the Guidelines as "nonbinding" in *Andrus* v. *Sierra Club*, 442 U.S. 347, 353, n.10 (1979),

and ruled they were merely "advisory in nature." *Id.* at 356-357.

Subsequently, President Carter, by Executive Order No. 11991, 3 C.F.R. § 124 (1978), directed the CEQ to transform these non-binding, advisory Guidelines into binding legislative type regulations. These regulations were issued on November 29, 1978. 43 Fed. Reg. 55990, (1978), codified at 40 C.F.R. Parts 1500-1508.

These "regulations" purport to be "applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended ... ." 40 C.F.R. Part 1500.3. The CEQ claims that these "regulations" derive legal authority from the following:

> These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), Section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to Sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of Section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law.

*Id.*

It is clear from the foregoing analysis that none of the legislation relied upon as the legal basis for President Carter's Executive Order 11991 and the legal basis for the CEQ regulations constitutes delegation by Congress of authority to empower the CEQ to promulgate legally binding, legislative type rules governing implementation of NEPA. If such authority exists it must be found in the President's authority



under the Constitution, not in the legislation enacted by Congress.

## II
## THE PRESIDENT DOES NOT HAVE EITHER EXPLICIT OR INHERENT POWER UNDER THE CONSTITUTION TO AUTHORIZE THE CEQ TO PROMULGATE BINDING, LEGISLATIVE TYPE RULES TO GOVERN IMPLEMENTATION OF THE PROCEDURAL PROVISIONS OF THE NEPA

Apart from the statutes discussed above, President Carter also based Executive Order 11991 upon the power vested by the Constitution in the Office of the President of the United States.

### A. Explicit Constitutional Authority

Since Article I, Section 1, provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States ... " it is not surprising that Article II contains no explicit grant of legislative power to the President. Article II provides in Section 1 that "[t]he executive Power shall be vested in a President of the United States ... ," in Section 2 that "[t]he President shall be Commander in Chief ... ," that he exercise a miscellany of powers pertaining to foreign relations of the United States, and various powers of appointment of officials. The only stated power of the President in the Constitution that can conceivably be treated as providing some basis for legislative authority is the "take Care" clause in Article II, Section 3, which imposes upon the President the duty to "take Care that the Laws [enacted by Congress] be faithfully executed." Apart from this clause, it is clear that nothing in Article II or elsewhere in the Constitution vests legislative authority in the President to transform the CEQ into a regulatory agency by delegating power (which Congress withheld) to promulgate legally binding legislative type regulations governing implementation of NEPA. Thus any such authority for Executive Order 11991, if it exists at all, must be inferred from the "take Care" clause.

## B. Inherent Constitutional Authority

Article II, Section 1, reposes all executive power in a single chief executive: "[t]he executive Power shall be vested in a President of the United States ... " who is charged in Section 3 with the responsibility to "take Care that the Laws be faithfully executed." The President is also empowered to appoint the officers in the Executive Branch (with the advice and consent of the Senate) and require these officers to report to him so that he can determine whether the laws are being "faithfully executed," a requirement that implies the right to confer with these officers. This constitutional system implies, at a minimum, the power of the President to maintain operational oversight, supervision, and management of the administrative process of the Executive Branch.

This Court in a series of major constitutional decisions has addressed various aspects of the scope of the President's implied powers. That the exclusive power and responsibility to execute the law implies the power to remove subordinate officials without the consent of Congress was settled in *Myers* v. *United States*, 272 U.S. 52 (1926). *Myers* also held that the President possessed the power to "supervise and guide" subordinate officials in "their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." *Id.* at 135. Under the *Myers* view of presidential power, this broad role as supervisor of the execution of the laws (derived from the "take Care" clause) can only be narrowed by an express provision by Congress that prohibits the President from overruling or revising a subordinate officer's interpretation of his statutory duty in a particular instance. The claim is that absent such express prohibition by Congress this supervisory power over subordinates (such as the CEQ) is unrestricted.

However, this expansive interpretation of Presidential power was narrowed by subsequent decisions *See Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935) and *Weiner* v. *United States*, 357 U.S. 349 (1958), which invalidated removal of officers of independent agencies who



had not acquiesced to presidential supervision and control. In *Humphrey's Executor* this Court distinguished between the President's authority over "executive functions," and the President's authority over agency functions that have quasi-legislative or quasi-judicial aspects. 295 U.S. at 628-629. The Court distinguished and narrowed the scope of *Myers* to "the narrow point actually decided," i.e., the President's power to dismiss a postmaster without Congressional consent. The Court expressly "disapproved" of any views in *Myers* which are "out of harmony with the views here set forth," *Id.* at 626, and went on to state, "the *Myers* case cannot be accepted as controlling here. A postmaster is an executive officer restricted to the performance of executive functions ... and hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive ... ." *Id* at 627. Thus, after *Humphrey's Executor*, presidential authority could not override, or dictate decisions to, agencies to which Congress had delegated either quasi-judicial or quasi-legislative functions.

Implicit in this decision is the older doctrine that the "take Care" clause does not convey power to the President to control the *interpretation* of law enacted by Congress. *Kendall* v. *United States*, 37 U.S. (12 Pet.) 524 (1838). In *Kendall* the Court ruled:

> This is a doctrine that cannot receive the sanction of this Court. It would be vesting in the President a dispensatory power, which has no countenance for its support in any part of the Constitution and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with the Power entirely to control the legislation of Congress ... .

*Id.* at 612-613.

In *Kendall* the President was seeking to *change*, in the guise of "interpreting" the law, a statutory scheme for the payment of postal contracts. In a subsequent case, *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487), Chief Justice Taney, sitting as a circuit judge, denied the power

of the President under the "take Care" clause to authorize the suspension of the writ of *habeas corpus*, a writ mandated by a statute enacted by Congress.

Thus, the Court in these Nineteenth Century cases precluded the President from wielding power under the "take Care" clause either to change or to abrogate legislative provisions enacted by Congress under the pretext of "interpreting" and enforcing the law. But the question remained whether the President may by executive order grant powers to a subordinate entity in the Executive Branch (such as the CEQ) which the Congress has not authorized or delegated.

The Court addressed this issue in *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), which invalidated a presidential executive order that directed the Secretary of Commerce to seize and operate the steel mills during the Korean War in order to assure continued war production. The Court rejected the claim that the President, absent congressional authorization, had "inherent power" under the Constitution to issue the executive order authorizing the Secretary to seize and operate the industry.

> The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress - it directs that a presidential policy be executed in a manner prescribed by the President.... . The Constitution does not subject this lawmaking power of Congress to presidential ... supervision or control.

*Id.* at 588 (Black, J., writing for the Majority of the Court).

Justice Jackson's famous concurring opinion noted that:

> Presidential powers are not fixed, but fluctuate, depending on their disjunction or conjunction with those of Congress ... . When the President takes measure incompatible with the expressed



> or implied will of Congress his power is at its lowest ebb ... .

*Id.* at 638.

Justice Jackson warned that a decision to sustain presidential power in such circumstances should be "scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id.*

The instant cases at bar involve only a slight variation on the *Youngstown* theme. In *Youngstown*, the President sought by executive order to grant power, which Congress had withheld, to a subordinate (the Secretary of Commerce) to seize and operate the steel mills. In the instant case, the President by executive order sought to grant power, which Congress had withheld, to transform the CEQ into a regulatory agency with power to promulgate binding legislative type rules to enforce the NEPA.

In one sense the instant case involves a less justifiable arrogation of power by the President than was the case in *Youngstown*. *Youngstown* involved a national emergency and the dissenting justices, who would have upheld the executive order, relied upon a series of national emergency cases in which presidential action without prior congressional authorization had been upheld, e.g., President Lincoln's issuance of the Emancipation Proclamation without statutory authority. *The Prize Cases*, 67 U.S. (2 Black) 635 (1865). The Carter Executive Order 11991 does not purport to be based upon or justified by the existence of a national emergency.

### C. The Effect of Congressional Silence

Indisputably, in the period subsequent to President Carter's promulgation of Executive Order 11991 and the CEQ's promulgation of its "Regulations," Congress has not repudiated these exercises of undelegated legislative authority. Does congressional silence constitute congressional consent?

Several decisions of the Court are suggestive but none appear to be wholly on point. In *TVA* v. *Hill*, 437 U.S. 153

(1978), where Congress recognized that completion of the Tellico Dam would result in inundation and destruction of the critical habitat of an endangered species in violation of the Endangered Species Act, this Court refused to construe repeated congressional appropriations of funds explicitly earmarked to complete the Tellico Dam, as amounting to congressional consent or acquiescence, *sub silentio*, to an implied exception to the Endangered Species Act.

Similarly, the Court declined to find Congress had ratified security clearance provisions promulgated by an executive branch official simply because Congress had failed to override them and continued to appropriate funds for the Agency:

> If acquiescence or implied ratification were enough to show delegation of authority to take actions within the area of questionable constitutionality, we might agree that delegation has been shown here ... . Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

*Greene* v. *McElroy*, 360 U.S. 474, 506-507 (1959).

Both of the foregoing decisions suggest that the silence of Congress does not necessarily mean consent. To hold otherwise would place Congress in the invidious position of having constantly to review the conduct of the multifarious agencies within the Executive Branch to ferret out and repudiate such excesses or otherwise be deemed to have ratified or acquiesced in them by silence and inaction.

The only context in which congressional acquiescence has been found in the failure of Congress to act has been the failure of Congress to modify or disapprove a "systematic, unbroken, executive practice" which pertains to uniquely executive branch functions such as the management of public lands. *See, United States* v. *Midwest Oil Co.*, 236 U.S. 459, 474 (1915).



In the instant case, the conversion of an advisory council into a regulatory agency goes far beyond such ministerial activity as management of public lands. The silence of Congress in this case should not be deemed to be consent.

## III.
## THERE IS NO STATUTORY BASIS IN NEPA FOR THE "WORST CASE ANALYSIS" REGULATION

Even if the Court finds that Congress has acquiesced *sub silentio* to the transformation of the CEQ into a regulatory agency with power derived from Executive Order 11991 to promulgate regulations binding on all federal agencies for the implementation of the NEPA, the "worst case analysis" regulation (40 C.F.R. § 1502.22) is not authorized or supported by any provision in NEPA, is *ultra vires*, and hence void and unenforceable.

The Court has repeatedly declared unlawful any regulation that exceeds statutory authority:

> The power of an administrative officer or board to administer a Federal statute and to prescribe rules and regulations to that end is not the power to make law - for no such power can be delegated by Congress - but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

*Manhattan Gen. Equip. Co.* v. *Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1935) (citations omitted). *See also City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973), citing *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1946); *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 303 (1944)).

Justice Brandeis articulated this principle in *Campbell* v. *Galens Chemical Co.*, 281 U.S. 599, 610 (1930): "The limits of the power to issue regulations are well settled. They may

not extend a statute or modify its provisions." Citing *International Ry. Co.* v. *Davidson*, 257 U.S. 506, 514 (1922).

Even if Executive Order 11991 had undertaken to convey authority to create a "worst case analysis" requirement, it would be powerless to do so. The Court in *Cole* v. *Young*, 351 U.S. 536,557 (1956), squarely held that an executive order is impotent to add requirements not contained in the underlying legislation:

> The basis for our decision is simply that the standard prescribed by the Executive Order and applied by the Secretary is not in conformity with the Act.

These constraints upon arrogation of undelegated power have been specifically applied by this Court to NEPA cases: "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural," *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978), and "the only procedural requirements imposed by NEPA are those stated in the plain language of the Act." *Id.* at 548. "The procedural duty imposed upon agencies by [the action-forcing requirements of Section 102(2)(C)] is quite precise, and the role of the courts in enforcing that duty is similarly precise." *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 (1976).

As shown hereafter, despite these clear admonitions, various Courts of Appeal have seized upon the "worst case analysis" regulation and by dint of judicial legislation fleshed out a so called "common law" of NEPA requirement that is nowhere mandated or authorized by the statute.

### A. The "Worst Case Analysis" Regulation

The origin of the worst case analysis regulation is obscure. It emerged for the first time in the 1978 CEQ Regulation, Section 1502.22. It did not appear in the Guidelines that preceded the Regulations. The first judicial analysis of this regulation occurred in *Sierra Club* v. *Sigler*, 695 F.2d 957 (5th Cir.), *reh'g den.*, 704 F.2d 1251 (5th Cir. 1983), in which the court, although admitting there was no



clear statutory basis in the NEPA for the regulation, extrapolated a basis from *dicta* found in three earlier NEPA decisions by the Court of Appeals for the District of Columbia: *Scientists' Inst. for Public Information, Inc.* v. *Atomic Energy Commission*, 481 F.2d 1079 (D.C. Cir. 1973); *Carolina Envtl. Study Group* v. *United States*, 510 F.2d 796 (D.C. Cir 1975); and *Alaska* v. *Andrus*, 580 F.2d 465 (D.C. Cir.), v*acated in non-pertinent part sub nom. Western Oil and Gas Ass'n* v. *Alaska*, 439 U.S. 922 (1978), and from CEQ policy releases entitled "Forty Most Asked Questions Concerning CEQ's NEPA Regulations" and "Talking Points on CEQ's Oversight of Agency Compliance with NEPA Regulations (1980)." Based on such foundations the Court in *Sigler* held, without supporting authority or analysis, that the "worst case analysis" rule was binding: "[i]t is well-established that the CEQ's regulations and its interpretation of them are binding on this court and on agencies preparing EISs." 695 F.2d at 972.

Despite early rejection of the validity of the concept of "worst case analysis" in the Ninth Circuit ("Everyone recognizes the catastrophic results of the failure of a dam; to detail these results [in an EIS] would serve no useful purpose." *Warm Springs Dam* v. *Gribble*, 621 F.2d at 1027 (1980)), after the Fifth Cicuit's decision in *Sigler*, that precedent was enthusiastically, if uncritically, adopted and expanded by the Ninth Circuit to apply not only to the Environmental Impact Statement (EIS), but to the less formal Environmental Assessment (EA), *Southern Oregon Citizens Against Toxic Sprays, Inc.* v. *Clark*, 720 F.2d 1475 (9th Cir. 1983), (*SOCATS*) and applied retroactively to programs begun before the effective date of the regulation on July 30, 1978. *Save Our Ecosystems* v. *Clark*, 747 F.2d 1240 (9th Cir. 1984). Although the Court of Appeals for the District of Columbia repudiated retroactive application of the regulations, it enthusiastically approved of *Sigler* in extensive *dicta*. *San Luis Obispo Mothers for Peace* v. *Nuclear Regulatory Commission*, 751 F.2d 1287, 1302 (D.C. Cir. 1984), *vacated on other grounds*, 760 F.2d 1320 (D.C. Cir. 1985).

Alarmed by such judicial activism, on August 11, 1983, the CEQ published a "Clarification" of Section 1502.22, which repudiated the interpretation of its "worst case analysis" regulation as adopted by *Sigler*:

The obligation to prepare a worst case analysis, at bottom is nothing more than the duty to provide information essential to a reasoned choice among alternatives ... . Thus, a worst case analysis is required in those circumstances where significant adverse impacts are possible, and scientific uncertainties or gaps in available information exist regarding those impacts. This means that there is an initial threshhold of probability which must be crossed before Section 1502.22 comes into play. This threshold of probability is provided in Section 1502.8, whch defines the term "effects" to include those that are both direct and indirect, and are "reasonably foreseeable." Thus, an agency need only examine the reasonably foreseeable effects of its proposed action under any circumstances. Section 1502.22 is applied when an effect of a proposed federal action is reasonably foreseeable and the consequences of that effect cannot be ascertained because of scientific uncertainty or gaps in available knowledge... . Put another way, speculative information or potential adverse impacts with an extremely low probability of occurrence could not be considered "essential to a reasoned choice among alternatives," as used in Section 1502.22.

48 Fed. Reg. 36, 487 (1983).

When the CEQ "clarification" went unheeded, it was withdrawn and instead the CEQ instituted a rulemaking proceeding, Advanced Notice of Proposed Rulemaking, 49 Fed. Reg. 50,774 (1984), and thereafter rescinded Section 1502.22 and replaced it with the following regulation:

> When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable



> information, the agency shall always make clear that such information is lacking.
> (a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.
> (b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement: (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.
> (c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 C.F.R.1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact

statements in progress agencies may choose to comply with the requirements of either the original or amended regulation.

51 Fed. Reg. 15656 (April 25, 1986).

Rescission of the "worst case analysis" regulation reflected the widespread recognition that this construct was essentially bogus and lacked any substantive justification. The principal criticisms of the concept are discussed in the following section.

### B. "Worst Case Analysis" Is Impermissibly Vague and Is Incapable of Objective Enforcement

#### 1. *What Constitutes "Worst Case" Is Indefinable.*

There was no definition of "worst case" in Section 1502.22 and there are no objective criteria or standards to employ to establish consensus on a case-by-case basis as to what constitutes the "worst case" in any given decision-making process. In *Sigler*, the worst case was postulated by the Sierra Club which was an interested party committed to stopping the project under any circumstances. For tactical purposes, all Sierra Club needed to do was postulate any kind of worst case event other than that addressed in the Oil Spill Analysis which the Corps had conducted and included in the NEPA and the administrative records. Had the Corps included in its analysis the total cargo loss scenario postulated by the Sierra Club, it could have faulted the Corps' analysis for failure to consider a collision between two supertankers and the spill of two cargoes in the Galveston Channel. If the Corps had addressed the effects of a collision of two supertankers in its analysis, the Sierra Club could have postulated an additional participant in the collision such as a nuclear submarine, with the result that two supertanker cargoes plus radioactive debris were spilled into the environment. And so on, *ad infinitum*. The regulation was thus a prescription for subjective irrationality heavily skewed to favor anti-growth litigants.



#### 2. *"What Constitutes Compliance with the "Worst Case Analysis" Requirement Is Unknowable.*

There is likewise no definition or objective criteria as to what methodology, assumptions, or procedures are mandated by the requirement to prepare a "worst case analysis." One consequence of this vagueness was demonstrated in *SOCATS* in which the Court had ordered remand to the agency to prepare a "worst case analysis" for the federal herbicide spraying program. When the analysis was completed and its sufficiency came up for review, the court found the analysis insufficient and ordered the agency to conduct an analysis along lines indicated by the court, i.e., to do a study of the environmental cost that would be incurred if everyone who could possibly be exposed to the herbicides developed cancer. Thus, as shown, *infra*, the amorphous nature of what constitutes adequate "worst case analysis" almost inevitably produces situations in which courts intrude impermissibly into agency decisionmaking.

#### 3. *"Worst Case Analysis" Does Not Generate Reliable and Probative Data.*

Under the original CEQ regulation the duty to perform "worst case analysis" was triggered by the existence of "gaps" in available data pertaining to possible impacts that would result if a proposed decision were put into effect. But the performance of "worst case analysis" does not generate reliable and probative data to fill these gaps, and therefore does not provide a substantive substitute for the missing data. Instead, "worst case analysis" mandates the adoption of some drastic hypothesis and the generation of speculative data as to what environmental costs would result if the hypothetical event ever occurred. Thus, the court's ruling in *Sigler* that "worst case analysis" is necessary or even contributes to or facilitates "reasoned decisionmaking" is spurious.

#### *4. There Are No Objective Criteria to Determine When Sufficient Uncertainty Exists to Trigger the Requirement to Prepare "Worst Case Analysis."*

Every proposed action involves some uncertainty. As shown above, the number of possible worst case scenarios that may be adduced is limited only by the imagination of parties seeking to obstruct implemetation of the proposed federal decision. The same is true with respect to uncertainty. There are not only no objective criteria to tell decisionmakers and reviewing courts when there is sufficient uncertainty to trigger the requirement to prepare "worst case analysis," there are also no criteria to determine what uncertainty must be disclosed. What degree of certainty is sufficient to satisfy a reasonable mind is highly debatable and fraught with subjective value judgements.

### C. The Intrinsic Vagueness of the "Worst Case" Construct Leads to Undue Judicial Intervention Into Environmental Decisionmaking.

Whenever the issue of scientific or technical uncertainty arises in federal decisionmaking, it transmutes into an issue of who has the power to make the ultimate substantive decision whether to implement the proposal. Does the agency created by Congress have the power or can the reviewing court, by faulting the agency's decisionmaking process, exercise a practical veto over the proposal or impose adoption of the alternative it prefers?

There can be little doubt that the NEPA and other environmental statutes have excited substantial judicial activism that has taken the form of substituting judicial solutions for those devised by the responsible agency. The frequency and degree of judicial usurpation of the agencies' decisionmaking role has prompted this Court on several occasions to overrule courts of appeal that have exceeded the bounds of permissible judicial review. In *Vermont Yankee* this Court rebuked the Court of Appeals for the District of Columbia for presuming to impose "appropriate" but nonstatutory procedures upon the Nuclear Regulatory Commission (NRC) to be used to conduct



its rulemaking. 435 U.S. 519. The Court also faulted the Court of Appeals because it "improperly intruded into the agency's decisionmaking process [on the substantive merits], making it necessary for us to reverse and remand with respect to this part of the case also." *Id.* at 525.

Subsequent to remand, the NRC repromulgated and somewhat modified the challenged rule, the so-called Table S-3 Rule, which thereafter became the subject of further court of appeals review on remand. This rule was a "generic" rule applying to all individual NRC licensing proceedings, consisting of a table of numerical values representing the environmental effects resulting from the uranium fuel cycle ranging from the "front-end" activity of producing the fuel, to the "back-end" activity of disposing of spent fuel. The court on remand focused on a single line in the Table that pertained to the "back-end" issue which postulated that each nuclear plant to be licensed by the NRC would produce eleven million curies of high level and transuranic radioactive wastes annually, and that these wastes would be buried in a permanent repository that would store them in a totally enclosed state. The effect of this computation in the Table thus postulated a zero-release assumption for a minimum of 250,000 years. *Natural Resources Defense Council* v. *NRC*, 685 F.2d 459, 500-01 (D.C. Cir. 1982). The effect of employing this assumption in the individual licensing proceedings would be expressed in the cost/benefit analysis as a zero-cost value.

The court of appeals addressed the issue of whether this computation in the Table violated the NEPA or was arbitrary and capricious under the pertinent APA standard for judicial review. The decision consisted of an opinion by each of the three judges participating on the panel. Judge Bazelon held that the rule violated both the NEPA and the APA, but upheld the NRC finding that the repository was economically feasible. Chief Judge Edwards from the Sixth Circuit agreed with Judge Bazelon that the rule violated the NEPA and the APA, but overruled the NRC feasibility ruling. *Id.* at 494-95. Judge Wilkey dissented from Judge Bazelon's holding that the rule violated the NEPA and the APA, but concurred in the finding of economic feasibility. Judge Bazelon's opinion was therefore the ruling of the court.

According to his opinion the rule violated the NEPA because there was some evidence in the record, which the NRC did not reject as invalid, which indicated that there was some uncertainty whether the waste could be stored in a totally enclosed manner for 250,000 years. By adopting the zero-release assumption Judge Bazelon held that the NRC violated the NEPA because it did not consider the uncertainty about the risk that the waste might be liberated, an "impact" that in his opinion the NEPA required to be considered, and that this "self-evident error in judgment" amounted to arbitrary and capricious action under the APA. *Id.* at 481. Judge Bazelon also faulted the application of the generic rule to cost-benefit analysis for individual licensings because to do so would violate a supposed NEPA requirement that environmental costs be considered and the NRC could not find the "environmental costs represented by the uncertainties to be zero unless their cost is, in fact, zero." *Id.* at 484. Thus, Judge Bazelon's decision was based upon the same principle as the CEQ regulation, i.e., it assumed a legal requirement to take uncertainty into account and attribute an environmental cost to it.

Judge Wilkey's dissent takes sharp exception to the manner and scope of Judge Bazelon's review. "If there ever was a doubt prior to today, it is now clear that this court is committed to an assumed role as high public protector of all that is good from the perceived evils of the nuclear age." *Id.* at 517. The theory of Judge Wilkey's criticism was that the majority substituted its judgment for that of the NRC and, ignoring the unequivocal command of *Vermont Yankee* to determine only whether the NRC rule was arbitrary and capricious under the APA, had instead substituted its own substantive conclusion. *Id.* at 545.

Thereafter, the Supreme Court in an unanimous decision reversed the court of appeals on the ground, *inter alia*, that Judge Bazelon's NEPA ruling was invalid and that the court had gone beyond its authority under the APA in reviewing agency decisionmaking under the NEPA. The Court held: "[a]dministrative decisions should be set aside in this context, as in every other, only for substantitve procedural or substantive reasons as mandated by statute ... not simply because the court is unhappy with the result achieved."



*Baltimore Gas and Electric Co.* v. *NRDC*, 462 U.S. 87, 97 (1983), *rev'd NRDC* v. *NRC*, 685 F.2d 459 (D.C. Cir. 1982) (quoting *Vermont Yankee*, 433 U.S. 519, 588 (1978)).

The Court also placed special emphasis on the need for exercising extreme deference when the problem of uncertainty is involved:

> [A] reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential. *See, e.g., Industrial Union Dept.* v. *American Petroleum Inst.* 448 U S. 607, 656 (1980) (plurality opinion); id. at 705-706 (Marshall, J. dissenting).

*Id.* at 103

This Court has made it abundantly clear that the only legally binding and enforceable requirements imposed by the NEPA "are those stated in the plain language of the Act ... ." *Vermont Yankee*, 433 U.S. at 548, and has repeatedly struck down a claimed NEPA "requirement" if "it is a creature of judicial cloth, not legislative cloth." *Weinberger* v. *Catholic Action of Hawaii Peace Educ. Project* 102 S. Ct. 197 (1981). Despite repeated rejection by this Court of efforts by activist courts to fabricate NEPA "requirements" that lack any statutory basis, the cases at bar involve just such an attempt. The root of this most recent fabrication of a non-statutory NEPA "requirement" is to be found in *Sigler* in which the court candidly acknowledged that NEPA's "literal language does not require a worst case analysis ... " 659 F.2d. at 969, but nevertheless proceeded to fabricate such a requirement based, *inter alia*, upon *dicta* in three earlier NEPA cases. In this fashion the NEPA's "common law" of "worst case analysis" was born out of nothingness. If, as conceded by the *Sigler* court, the literal language of the NEPA "does not require worst case analysis," there was nothing in the NEPA to vest any precedential value in the *dicta* of the earlier NEPA cases upon which *Sigler* relied and which purported to have been

"codified" in section 1502.22. Nothing plus nothing equals nothing, not a "common law" of NEPA requiring "worst case analysis," or a regulation that codifies these non-existent "authorities."

Despite the insubstantiality of the basis and origin of this strange construct, it has proven stubbornly vital. Not even the express rescission of the rule (section 1502.22) by the CEQ in 1986 daunted the panels of the Ninth Circuit which decided the cases at bar. In both cases at bar, the court rejected the argument by the Government that section 1502.22 is inapplicable because it was rescinded by the CEQ on May 27, 1986. In both cases the court bases its conclusion on the claim that "the worst case regulation is a codification of prior NEPA case law ... " and "[t]hus, the rules embodied in the regulation remain in effect even though the regulation was rescinded." 820 F.2d at 1058 n.8, 833 F.2d at 817 n.11. The cases cited in these footnotes are all cases that derive their "authority" from and are based upon *Sigler*. Thus, the entire edifice of precedent relied upon by the courts in the cases at bar are based entirely upon *Sigler*.

This Court has the opportunity to extirpate perhaps the most blatant attempt of all to engraft a requirement onto the NEPA which has no basis in the statute. This "worst case analysis" construct has insidiously pervaded the policies, practices and regulations of numerous agencies over the past several years and continues its attenuated existence in the form of individual agency rules that were originally adopted to comply with the CEQ regulation 1502.22. *See, e.g., Carolina* v. *Hudson*, 665 F.Supp. 428 (E.D.N.C. 1987), in which the district court held that despite the rescission by the CEQ of section 1502.22, the requirement continued to exist because the regulation of the U.S. Army Corps of Engineers (33 C.F.R. Parts 230, App. B-3)(1987) adopted by the Corps in order to comply with the CEQ regulation had not as yet been rescinded.

Accordingly, in order to eliminate the "worst case analysis" requirement in all its manifestations the Court should unequivocally rule that there is no legal basis in the NEPA for a "worst case analysis" requirement, and that any and all regulations requiring such analysis are void and unenforceable.



## CONCLUSION

The arrogation of power manifest by the fabrication out of nothingness of a "worst case analysis" requirement is merely a specific manifestation of the more massive arrogation of power that took place when President Carter, without any Congressional authority, transformed the CEQ from an advisory panel into a regulatory agency claiming power to regulate all federal agency decisionmakers with respect to their NEPA obligations. It is respectfully submitted that the Court should declare the CEQ Regulations as a whole void and unenforceable.

Respectfully submitted,

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# AMICUS CURIAE

# BRIEF

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Nos. 87-1703, 87-1704

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

F. Dale Robertson, Chief
of the Forest Service, et al.,
*Petitioners,*

v.

Methow Valley Citizens Council, et al.,
*Respondents.*

John O. Marsh, Jr., Secretary of the Army, et al.,
*Petitioners,*

v.

Oregon Natural Resources Council, et al.,
*Respondents.*

**On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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**No. 87-1703**

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F. DALE ROBERTSON,
Chief of the Forest Service, *et al.*,
*Petitioners,*

v.

METHOW VALLEY CITIZENS COUNCIL, *et al.*,
*Respondents.*

**No. 87-1704**

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JOHN O. MARSH, JR., Secretary of the Army,
*Petitioners,*

v.

OREGON NATURAL RESOUCES COUNCIL, *et al.*,
*Respondents.*

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**On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES

The International Association of Fish and Wildlife Agencies, having obtained written consent of all parties to these consolidated cases as required by Rule 36.2, submits this brief in support of respondents.

## INTEREST OF AMICUS CURIAE

The International Association of Fish and Wildlife Agencies (hereinafter "the Association") is a voluntary, unincorporated association dedicated to coordinating the efforts of public administrative agencies responsible for protection and management of the fish and wildlife resources of North America. Founded at Yellowstone National Park in 1902, the Association's government members include the fish and wildlife agencies of all fifty states and the Commonwealth of Puerto Rico, and of ten Canadian provinces and territories. Government members also include federal and dominion agencies having jurisdiction and responsibility for fish and wildlife resources.

In the United States, primary authority and responsibility for protection and management of fish and resident wildlife are vested in the Association's state government members. In pursuance thereof, each state has enacted conservation legislation establishing a fish and wildlife agency or agencies charged with responsibility to protect and manage fish and resident wildlife found within the state. The policies of Oregon and Washington, whose trust resources are implicated in these proceedings, are typical. The statute establishing the Oregon Department of Fish and Wildlife declares it to be "the policy of the State of Oregon that wildlife shall be managed to provide the optimum recreational and aesthetic benefits for present and future generations of the citizens of this state." Oregon Rev. Stats., §496.012. The Washington legislature declares



that wildlife is the property of the state and has directed the Department of Wildlife to "preserve, protect and perpetuate wildlife." Rev. Code of Washington, Annot., §77.12.010.

Charged with such responsibility, it devolves upon the Association's state government members to participate actively in the NEPA process relating to proposals for major federal actions significantly affecting the environment when such proposals affect public trust resources for which member agencies have jurisdiction.

Congress has recognized the state interest in fish and wildlife on national forests, making explicit that federal legislative enactments are not to be construed "as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests." Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. §528; §302(b), Federal Land Policy Management Act of 1976, 43 U.S.C. §1732(b). And *see Defenders of Wildlife* v. *Andrus*, 627 F.2d 1238, 1247-1250 (D.C. Cir. 1980) (despite constitutional power under the Property Clause relating to federal lands, Congress has traditionally allotted authority to manage wildlife to the states). Along with recognition of the state interest with respect to fish and wildlife on national forests, Congress has enacted legislation requiring consultation by federal development agencies with state wildlife agencies whenever the waters of any stream or other body of water are proposed to be controlled or modified for any purpose whatever, including navigation and drainage. § 2(a), Fish and Wildlife Coordination Act, 16 U.S.C. § 662(a). The purpose of such consultation is prevention of loss or damage to wildlife resources in connection with impounding, diverting or controlling of waters.

From the foregoing recital it is evident that state government members of the Association have a clear interest in representing public trust resources by virtue both of statutory responsibility and of opportunities established by

congressional enactments. Identification of measures to mitigate adverse environmental impacts of major federal actions and professional judgments as to the effectiveness of mitigation measures are central to the state role. From this perspective, the Association is of the view that acceptance of the government's position in these consolidated cases would have harmful consequences for fish and wildlife resources. Contrary to the position of the government, the Association believes that the National Environmental Policy Act does not sanction the agency failures here to provide specific mitigation plans at the EIS stage or that mitigation for fish and wildlife losses may be separated from environmental planning and considered at a subsequent time. If accepted by the Court, the government's position would effectively remove fish and wildlife resource agencies from the NEPA process until later stages of project development when engineering and fiscal constraints are greatest and when opportunities for successful implementation of a mitigation plan are diminished.

## STATEMENT OF THE CASE

In both the consolidated cases, the court of appeals concluded that NEPA processes undertaken by the Corps of Engineers and the Forest Service, respectively, were legally deficient because both agencies failed to discuss adequately ways to mitigate significant adverse environmental impacts. Closely related to the legal issue of adequacy of mitigation planning are issues whether significant new information required preparation by the Corps of a supplemental EIS and whether the absence of environmental information requires preparation of a "worst-case" analysis.

### The Elk Creek Case

In No. 87-1704, the Elk Creek dam contemplated by the Corps would be a 238 foot high, rock fill dam, located 1.7



miles above the confluence of Elk Creek with the Rogue River in southwestern Oregon. Elk Creek dam is one of three multiple-purpose dams which comprise the Rogue River Basin Project, designed to relieve flooding in the Rogue Basin and to accomplish additional project purposes. The Lost Creek dam and the Applegate dam are now completed. At full pool, the lake created by the Elk Creek dam would be 6.2 miles long, have 18 miles of shoreline, and would inundate 1,290 acres of land. A final EIS on the Elk Creek project was filed by the Corps in 1971, the statement acknowledging that further studies of turbidity (murkiness due to stirred-up sediment) potential was required. Turbidity studies were subsequently performed and discussed in a draft Supplemental EIS released in 1975 but controversy over impacts and benefits of the project led to a suspension of further work until effects of the Lost Creek dam on water quality in the Rogue River could be observed. The 1975 draft Supplemental EIS was not made final.

Lost Creek dam was closed in February 1977 and its reservoir was filled completely by May 1978. Based on Corps' observations of turbidity caused by Lost Creek dam during 1977 and Corps' computer simulation models, the Corps in 1980 filed a draft EIS Supplement on the Elk Creek project which included turbidity and temperature projections. The draft became a final EIS Supplement in December 1980.

Six years earlier, in 1974, the Oregon Department of Fish and Wildlife (ODFW) began extensive studies, funded by the Corps of Engineers, to determine the impacts of Lost Creek dam on chinook salmon and steelhead trout populations in the Rogue River. The goal of Phase I of the study, undertaken during the period 1974-1981, was to determine direct and immediate effects of the operation of Lost Creek dam on production and harvest of salmon and steelhead; Phase II was designed to identify long term effects of changes in the juvenile life history on the age

and abundance of returning adults. Vol. 1, Lost Creek Dam Fisheries Evaluation Report, Phase I Completion Report, ODFW 1985, 1. In order to determine operating criteria for Lost Creek dam that would optimize production and harvest of fish downstream, ODFW proposed to develop simulation models that would predict the effects of varying water temperature, flow, and hatchery supplementation on abundance of salmon and steelhead. Pursuant thereto, ODFW in August 1986 presented a report containing a simulation model of the Rogue summer steelhead population based on data gathered from 1974 through 1984. Lost Creek Dam Fisheries Evaluation, The Influence of River Temperature and Flow in the Production and Harvest of Summer Steelhead in the Rogue River, ODFW, 1986, 3. In March 1987 ODFW evaluated effect of the Lost Creek dam on spring chinook in the Rogue, its report presenting findings from twelve years of research on this species in the Rogue. Rogue Basin Fisheries Evaluation, Effects of Lost Creek Dam on Spring Chinook Salmon in the Rogue River, ODFW, 1987, 5.

In February 1987, in an internal memorandum, the author of the August 1986 ODFW report discussed new information and raised additional concerns regarding possible effects of Elk Creek dam on fish resources of the Rogue River. Drawing on the benefit of insight derived from extensive evaluations of the effects of Lost Creek dam on downstream salmonids and pointing out that spring chinook runs on the Rogue were at an all-time low, the ODFW memorandum raised concerns as to the likelihood that Elk Creek dam would increase water temperatures downstream during fall and early winter; that increase of only 1°C during January would decrease survival of spring chinook by 60-80 percent (subsequently recalculated by ODFW to 30-45 percent for a 1°C increase); that augmented flow from Elk Creek during September-October is projected and that augmented September-October flows from Lost Creek and Applegate dams have already decreased angling opportunities in the Rogue by washing out favored fishing riffles and by producing water too deep and swift for effective fly angling in most areas; that such augmented flow has caused spring chinook to spawn higher on gravel bars which increases the chances that redds (spawning areas) will be dewatered as the dams fill during February-April; and that impoundment of water behind Elk Creek dam may increase the incidence of fish diseases in the Rogue River. Appendix to Petitioners' Brief in No. 87-1704, at 3a-5a. The last stated concern was based on information derived from ODFW studies pointing to the possibility that disease in fish may have increased since closure of the Lost Creek dam. Id., 4a-5a.



Instead of undertaking analysis of the concerns raised by ODFW biologists through a supplemental EIS, the Corps addressed them in a so-called supplemental information report. The supplemental report noted that the internal ODFW memorandum did not represent an official position of the agency and then proceeded to address the concerns raised: (1) ODFW's estimate of decreased spring chinook survival, the Corps stated, does not take into account offsetting benefits from the dams and, in any event, ODFW's mathematical model is yet to be validated; (2) the fact that fall chinook mortalities occurred after Lost Creek was impounded is not firm enough evidence to implicate Elk Creek lake as a potential harbor of disease organisms; (3) flow augmentation has doubled Rogue flows in late summer and early fall and, while there have been complaints of reduced angling opportunities, studies are inconclusive and adverse effects on fishing during this period were recognized in the 1980 EIS Supplement. Appendix to Petition for Writ of Certiorari in No. 87-1704, 62a-65a.

As for wildlife, the Corps' 1986 supplemental information report also addressed concern that wildlife impacts associated with Elk Creek were not adequately addressed in the 1980 EIS Supplement because a wildlife mitigation plan had not been developed. The response of the Corps

was that the 1980 EIS Supplement recognized the need for development of a wildlife mitigation plan but because such a plan had not been developed in 1980 (and still had not been developed by 1986) the 1980 EIS Supplement assumed the maximum level of adverse effects to wildlife. According to the Corps, implementation of a mitigation plan will lessen the extent of wildlife impacts. Id., 61a.

According to the 1980 Supplemental EIS, flooding for the reservoir would adversely affect deer, elk and game bird populations. The mitigation plan for wildlife set forth in the 1980 Supplemental EIS, in its entirety, stated as follows:

> The compensation [for project-caused loss of wildlife habitat] would be accomplished by managing selected lands to increase the quality of habitat and therefore its carrying capacity for wildlife. The management would consist of a number of habitat manipulative techniques in conjunction with other land uses, landscaping at the project and development of recreation sites. Specific habitat development measures would be oriented toward development of palatable browse plants, creation of "edge," maximizing foliage height diversity in certain areas, and creation of snags in the reservoir. This compensation plan will be developed in coordination with Federal and State resource agencies.

832 F.2d at 1493.

**The Early Winters Case**

In No. 87-1703, a private developer filed application in 1978 to build a downhill ski area on Sandy Butte, a 3,900-acre parcel of National Forest System land overlooking the Methow Valley, an unspoiled, sparsely populated area on the eastern slope of the North Cascades in Washington. The Methow Valley provides critical winter range and migration corridors for the state's largest migratory deer herd. According to the district court, the area is "pristine."



As indicated in its environmental impact statement, the Forest Service selected alternative IV, a major development for downhill skiing having 16 lifts and capable of serving 8,200 skiers at one time (SAOT). Ski terrain would take in the north slope of Sandy Butte. Base area development would include vacation homes, permanent residences and tourist accommodations. Early Winters Alpine Winter Sports Study, 13 (hereinafter "Early Winters EIS"). Facilities to serve skiers would include restaurants, shops and other commercial uses; recreation and cultural facilities could include a golf course, horse stables, and a youth camp. Early Winters EIS at 13-14. The Early Winters project is characterized by the government as a "major destination ski resort," *i.e.*, a large, multiple-season ski area with sufficient ski runs, adequate vertical rise, and sufficiently varied activities and facilities packaged so as to entice vacationers to travel long distances and stay several days at the site. Brief for Petitioners in No. 87-1703, 4, n.3.

The Washington Department of Wildlife took the view that any level of development at Sandy Butte could result in substantial negative impacts to wildlife of the Methow Valley, impacts not limited to the immediate vicinity of the ski area. Speaking to alternative V, the preferred alternative in the draft EIS (10,500 SAOT, 16 lifts and the same base area development projections as alternative IV), the Department of Wildlife stated that the resulting loss of available winter deer range will be substantially greater than the 15 percent estimate of the draft EIS, perhaps higher than 50 percent, Early Winters EIS at 76, with the ultimate impact on the Methow deer herd a reduction in numbers in excess of fifty percent.

As in the Elk Creek case, the mitigation discussion in the Early Winters EIS is general in nature. As stated in the Early Winters EIS, "The [mitigation] measures are conceptual and will be made more specific as part of the design and implementation stages of the planning process. If later steps of the approved process identify other environmental problems associated with development on National Forest lands, additional mitigations may be required." Early Winters EIS at 14.

Separate challenges by private environmental organizations and sportsmen to the adequacy of the NEPA process engaged in by the Corps and the Forest Service were ultimately successful in the United States Court of Appeals for the Ninth Circuit. The rulings are now consolidated for review by this Court.

## SUMMARY OF ARGUMENT

I. Section 2 of NEPA declares it to be a purpose of the Act "to promote efforts which will prevent or eliminate damage to the environment." 42 U.S.C. §4321. That, in effect, is mitigation. Accepting that NEPA mandates no particular substantive outcome, the national policy declared in section 2 of NEPA can be achieved only if federal agencies attempt to mitigate adverse impacts of proposals. CEQ regulations are instinct with obligation on the part of federal agencies to consider mitigation measures. The position of the government that mitigation may be dealt with in generic terms, "cookbook" mitigation, in an EIS renders it impossible to comply with 40 C.F.R. §1505.2(c) which requires that the decisionmaker state whether all practicable means to avoid or minimize environmental harm have been adopted and if not, why they were not.

II. Staged project development is not exempted from NEPA. The government denounces the "rigid and unwarranted procedural regime" constructed by the court of appeals but the "procedural regime" relevant here is es-



tablished by NEPA, the first aim of which is to inject environmental considerations into agency decisionmaking. *Weinberger* v. *Catholic Action of Hawaii*, 454 U.S. 139 (1981). Contrary to the government's assertion that mitigation planning may be set to one side and dealt with during later stages of a project, mitigation planning is an integral part of the environmental analysis process and must proceed with the NEPA process rather than be separated from it. Separating mitigation from the NEPA process for treatment in later stages means leaving such considerations to the stages of a project when engineering and fiscal constraints loom larger and when the national policy to prevent or eliminate damage to the environment is more likely to be defeated.

III. The court of appeals was correct in concluding that a mule deer study not yet in existence could not serve to satisfy NEPA requirements on a matter as critical as the potential impact of the Early Winters project. In the face of incomplete information of a matter of such significance, special NEPA treatment is required, 40 C.F.R. §1502.22, whether it be worst-case analysis or reasonably foreseeable analysis. Certainly it is profoundly inadequate to assert that no such analysis was required because, while a mitigation plan had not been developed, the concept of "mitigation" could be invoked which, by definition, could be expected to reduce any impact. Such circularity does not satisfy 40 C.F.R. §1502.22. In any event, the judgment of the Department of Wildlife was that the Early Winters EIS greatly underestimated the impact on the Methow Valley deer herd. As to uncertainty concerning potential effects of the Elk Creek dam, the court of appeals was correct in concluding that information raised in the internal ODFW memorandum was both significant and probably accurate and thus required the Corps to supplement its 1980 impact statement.

## ARGUMENT

### I. The Requirements of the National Environmental Policy Act Are Not Fulfilled Where the Discussion of Mitigation Measures Relating to a Significant Impact in an Environmental Impact Statement Is Generic, Providing the Decisionmaker No Basis For Concluding That All Practical Means to Avoid or Minimize Environmental Harm Have Been Adopted

Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C), directs that, "to the fullest extent possible," federal agencies include in proposals for major federal actions significantly affecting the quality of the human environment a "detailed statement" on the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided, and alternatives to the proposed action. As this Court has stated, NEPA has twin aims: first, it "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519, 553 (1978). Second, NEPA "ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Weinberger* v. *Catholic Action of Hawaii*, 454 U.S. 139, 143 (1981). An agency, say the courts, must take a "hard look" at the environmental consequences before taking a major action, *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410, n.21 (1976), and it is the role of the courts to ensure that the agency "has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council*, 462 U.S. 87, 97-98 (1983). The "detailed statement" required by section 102(2)(C) of NEPA is "the outward sign that environmental values and consequences have been considered during the planning stage of agency actions." *Weinberger* v. *Catholic Action of Hawaii*, 454 U.S. at 143.



In both the consolidated cases, the court of appeals concluded that the NEPA processes undertaken were deficient because each failed to discuss adequately ways to mitigate adverse environmental impacts. In the Elk Creek case, flooding for the reservoir would adversely affect deer, elk and game bird populations yet the mitigation plan for wildlife consisted of nothing but generalities. 832 F.2d at 1493. The court of appeals found the listing of general mitigation measures inadequate to satisfy NEPA's procedural standards. According to the court below, the plan failed to specify particular techniques and failed to identify specific habitat development measures that would be utilized; more important, according to the court of appeals, the Supplemental EIS provided no analysis of the mitigation measures or any estimation of how effective the measures would be. 832 F.2d at 1493. In the Methow Valley case, the Forest Service concluded that, "with the implementation of mitigation measures," the impacts on the state's largest migratory deer herd stemming from construction of a major destination ski resort astride migration routes to critical winter range will be minor. Because the effectiveness of mitigation measures had not been assessed and the mitigation measures themselves not yet developed, the court of appeals concluded that the Forest Service lacked the critical information necessary to a reasoned decision. According to the court, the cursory discussion of impacts to the mule deer herd, based on incomplete information, is inadequate under NEPA as a matter of law. 833 F.2d at 818.

#### A. Both NEPA and the CEQ Regulations Require Discussion in an EIS of Specific Mitigation Measures in Connection with Significant Impacts of Major Federal Action

The government offers several arguments in an effort to overturn the holdings below that generic discussion of mitigation measures, "cookbook" mitigation, is inadequate under NEPA where significant environmental impacts are

likely. The ruling by the court of appeals that an EIS must analyze mitigation measures in detail and explain their effectiveness, 832 F.2d at 1493, is imbued, in light of the purposes of NEPA, with such common sense that it cannot be attacked directly. The government, therefore, challenges the court's requirement of a specific plan to mitigate fish and wildlife losses by characterizing it as "a significant new substantive and procedural obligation with respect to mitigation of environmental harm," Brief for Petitioner in No. 87-1703 at 22, and "the construction of a rigid and unwarranted procedural regime for developing mitigation measures." Id. at 24. But those characterizations are wide of the mark; there is no similarity between the ruling in the instant cases that an EIS requires more than a discussion of generic mitigation measures that might at some future time be adopted and a case like *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519 (1978), where the lower court overturned agency action because it disapproved the administrative procedure selected by the agency to address environmental review. NEPA may dictate no substantive outcomes but it does not follow therefrom that NEPA does not require a discussion of specific mitigation measures.

Moving beyond such characterizations, the core position presented by the government, once more an indirect challenge to the holding that NEPA requires consideration of specific plans to mitigate adverse environmental effects, is that, while NEPA requires environmental analysis and disclosure, an agency must discuss mitigation in a manner that aids reasoned decisionmaking. Brief for Petitioner in No. 87-1703, at 25. It is thus the position of the government, nineteen years after enactment of an Act to establish a national policy for the environment, that a federal agency "can and should consider mitigation opportunities when assessing the environmental consequences of a proposed action," Id., at 25, but there is no obligation to discuss specific measures or explain their effectiveness.



The government's position, in the Association's view, is contrary to the basic intent of NEPA.

The term "mitigation" is defined by CEQ to include avoiding environmental impact altogether; minimizing impact by limiting the degree or magnitude of action; rectifying impact by repairing, rehabilitating or restoring; reducing or eliminating impact over time by preservation and maintenance; and compensating for the impact by replacing or providing substitute resources. 40 C.F.R. § 1508.20. Mitigation of environmental impact is not "cookbook" as the government's position implies. Reliance in the NEPA process on generic techniques such as "managing selected lands to increase the quality of habitat," and use of "habitat manipulative techniques" such as creation of "edge" and maximization of foliage height diversity, 832 F.2d at 1493, mask the hard realities of actually achieving mitigation in cases like the ones at bar.

The reality is that mitigation planning is controversial and technical, often pressing at the edges of scientific "state of the art." The reality is that mitigation measures are often experimental and sometimes unreliable. And plainly the harshest reality of all is that when an agency invokes the concept of mitigation as a cure for impacts during the NEPA process but fails to address the specifics of mitigation in an EIS and does not commit to specific mitigation measures in its record of decision, the NEPA process will not achieve its purpose. Thus, for example, on the crucial matter of blockage of deer migration routes in the Early Winters case, the agency response in the EIS to Department of Wildlife concerns was to observe that "the opportunity exists to minimize potential problems through coordinated planning by agencies and publics involved." Early Winters EIS, at D-39. That is pure boilerplate and hardly a reassuring "outward sign" that environmental values have been injected into agency planning.

The government on brief rejects the suggestion that petitioners relied on mitigation as a cure in discussing adverse environmental effects. Instead, the government states,

> [T]he [Early Winters] Study provided a detailed discussion of the project's significant environmental effects without mitigation and then identified mitigation measures that, by definition, could be expected to reduce those impacts.

Brief for Petitioner in No. 87-1703, at 37, n.34. The government then wraps up this thought by asserting that the "qualitative" statements that implementation of mitigation measures would reduce adverse impacts are certainly reasonable. Ibid. In effect, the government says that it does not know what the measures will be but if they fall within the definition of mitigation they can be relied upon to mitigate.

Real world mitigation issues, as opposed to definitions, were the concern of the state. Commenting on the draft Early Winters EIS, the Washington Department of Wildlife recommended the no action alternative:

> Any level of development at Early Winters could result in substantial negative impacts to wildlife of the Methow Valley. However, impacts will not be limited to the immediate vicinity of the proposed ski area. Other parts of Okanogan County as well as the rest of North Central Washington could be affected. Facility development and the associated support and commercial expansion will drastically alter the ecosystem of the upper Methow Valley. Since it is our Department's responsibility to preserve, protect and perpetuate wildlife resources for the people of the State, we must recommend that the Forest Service choose the alternative which is most compatible with our goals. Clearly in the instance the only alternative we can support is Alternative I (No Action).[1]



Various concerns relating to Methow Valley wildlife were articulated by the Department of Wildlife in its comments on the draft EIS but its primary concern related to anticipated impacts at the primary ski development site and, more significantly, from residential build out in the valley on the Methow Valley mule deer herd, the state's largest migratory mule deer herd. In 1981 this portion of the herd was estimated at better than 30,000 animals, providing an estimated harvest that year of 3,247 deer. The state agency pointed out that Okanogan County residents attach great importance to the area's deer herd and, using an average of $1,980 which hunters spent in 1980 for every deer harvested in Washington, the 3,247 deer harvested in the Methow area in 1981 contributed over $6 million to the state's economy through expenditures for equipment, gas, food, lodging, and licenses. The Department of Wildlife gave as its professional judgment that impacts to mule deer will be more severe than predicted in the draft EIS. With full site development, accelerated development in the valley, increased road kills and increased human disturbance, the loss of available winter range will be substantially greater than 15 percent, according to the Department of Wildlife, and perhaps higher than 50 percent. With respect to deer numbers as contrasted to deer range, the Department pointed out that the Methow deer herd could be reduced in number by more than 50 percent.[2]

The agency disagreed with the draft EIS that sufficient summer range would be available, even at maximum development, for the existing deer herd and pointed out that access roads and on-site facilities could block migration routes to summer and winter ranges while off-site devel-

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[1] Letter dated November 18, 1982, from Washington Department of Game (now Department of Wildlife) to NEPA Coordinator.

[2] Id. at 2.

opments that block migration routes across the valley would impact the use of winter range. According to the Department, tagging studies indicate that some deer may use different migration routes to the valley in the fall than for their return trip to summer range in spring or early summer. Accordingly, the Department suggested that studies be undertaken to show which routes are used and when.[3]

Despite major concern as to impact of the Early Winters proposal on the deer herd, the Early Winters EIS contained no specific mitigation measures. Nevertheless, the record of decision concluded that alternative IV (8,200 SAOT) "provides a balance of concerns for the physical and biological components of the human environment in addition to concerns for social and economic welfare." But that assertion is without foundation. While CEQ regulations require that an agency state in the record of decision "whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not," the record of decision in the Early Winters EIS commits only that the Forest Supervisor "identify opportunities to mitigate loss of key mule deer winter range on private lands through future management of the Okanogan National Forest"[4] and that the Supervisor "participate in a multiagency agreement for management of the Methow Valley mule

[3] Id. at 3.

[4] Management of Sandy Butte is discussed in the Okanogan National Forest Plan prepared pursuant to National Forest System Land and Resource Planning Regulations. 36 C.F.R. Part 219. According to the proposed forest plan, land use of Sandy Butte is fixed for operation of a major downhill ski resort but the plan does not fix the area for mule deer mitigation. The proposed plan states that if the decision of the Regional Forester is upheld by the courts implementation will be guided by the Record of Decision for Early Winters. Draft Environmental Impact Statement, Proposed Land and Resource Management Plan, Okanogan Natural Forest, 1986, II-11.



deer population." Record of Decision, pars. 3, 5(B). Subsequent to issuance of the EIS, however, the Forest Service has declined to identify funding sources to assure that mitigation opportunities will be met. Due to the conceptual nature of the Early Winters EIS and the vagueness of commitment in the record of decision, avenues for insuring that mitigation is suitably developed are extremely limited.

### B. Discussion of Mitigation Measures in Generic Form Does Not Enable the Decisionmaker To Declare That All Practicable Means To Avoid Or Minimize Environmental Harm From The Alternative Selected Have Been Adopted, And If Not Adopted, Why They Were Not

The government argues that NEPA imposes no substantive obligation on the decisionmaker to mitigate adverse environmental effects of a proposal, and thus there is no procedural requirement either to analyze mitigation measures in detail or to explain the effectiveness of such measures. Brief for Petitioners in No. 87-1703, at 24. Instead, the government asserts a fundamentally different proposition, viz., that a federal agency "must discuss mitigation in a manner that aids reasoned decisionmaking." Id., at 25. In light of the facts in the consolidated cases, the government's fundamental proposition is that "reasoned decisionmaking" under NEPA does not require disclosure and discussion in an EIS of appropriate mitigation measures, and that a listing of conceptual measures to be made more specific at a later stage is adequate.

Amicus Association believes the government's proposition is contrary to the fundamental congressional purpose of ensuring that environmental factors are integrated into agency decisionmaking. Section 2 of NEPA, the purposes section, declares it to be a purpose of the Act "to promote efforts which will prevent or eliminate damage to the environment." 42 U.S.C. §4321. That, in effect, is mitigation. Indeed, accepting the constraint that NEPA mandates no substantive outcomes, the national policy declared in sec-

tion 2 to encourage productive and enjoyable harmony between man and his environment can only be achieved if federal agencies, through application of the NEPA process, consider ways to mitigate adverse impacts of projects carried out under their authority. In addition, section 102(2)(C), 42 U.S.C. §4332(2)(C), requires that the responsible official include a "detailed statement" on alternatives to the proposed action. Mitigation measures, of course, are a type of alternative to a proposed action. 40 C.F.R. §1508.25(b). Given the critical role of mitigation in the fulfillment of national policy enunciated in NEPA, the mitigation plan is one of the most important elements, if not the most important element, in the NEPA process. It is therefore difficult to accommodate the government's "fundamentally different" proposition with the purposes of NEPA.

It is equally difficult to harmonize the government's proposition with the CEQ regulations.[5] The government lists CEQ regulations relating to mitigation measures, Brief for Petitioners in No. 87-1703, at 28-31; Brief for Petitioners in No. 87-1704, at 21-22, but fails to credit the natural signification of the words chosen by CEQ. In fact, the CEQ regulations devote considerable attention to mitigation, defining the term at section 1508.20; calling on agencies at section 1508.25(b) to consider mitigation measures as an alternative to the proposed action in conducting the scoping procedure; calling on agencies at section 1502.14(f) to include appropriate mitigation measures in the "alternatives" section which CEQ describes as "the

[5] The CEQ regulations establish uniform procedures for implementing the provisions of NEPA. Executive Order 11991 of May 24, 1977 directed the Council on Environmental Quality to issue the regulations and, in accordance with the Executive Order, the CEQ regulations are binding on all federal agencies. 43 Fed. Reg. 55978 (November 29, 1978). While not legislative rules, the CEQ regulations are entitled to substantial deference by courts. *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979).



heart of the environmental impact statement"; calling on agencies at section 1502.16(h) to include in the "environmental consequences" section means to mitigate adverse environmental (if not "fully covered" under § 1502.14(f)); and calling on cooperating agencies having jurisdiction by law, at section 1503.3(d), to specify the mitigation measures considered necessary when such cooperating agency objects to a proposal.

The CEQ regulation most repugnant to the government's fundamental position on mitigation is section 1505.2(c) which requires that a concise, public record of decision be prepared in cases requiring environmental impact statements which shall:

> (c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

40 C.F.R. §1505.2(c). The record of decision was viewed by CEQ as a practical mechanism for overcoming a serious problem in the administration of NEPA prior to 1978, viz., "the separation between an agency's NEPA process and its decisionmaking process." 48 Fed. Reg. 55978, 55985 (November 29, 1978). According to CEQ,

> In too many cases bulky EISs have been prepared and transmitted but not used by the decisionmaker. The primary purpose of requiring that a decisionmaker concisely record his or her decision in those cases where an EIS has been prepared is to tie means to ends, to see that the decisionmaker considers and pays attention to what the NEPA process has shown to be an environmentally sensitive way of doing things. Other factors may, on balance, lead the decisionmaker to decide that other policies outweigh the

> environmental ones, but at least the record of decision will have achieved the original Congressional purpose of ensuring that environmental factors are integrated with the agency's decisionmaking.

43 Fed. Reg. at 55985-986. The cases under review demonstrate that a new problem has been substituted for the problem identified by CEQ in 1978. The problem then was that decisionmakers often ignored "the environmentally sensitive path" laid out in an EIS. Now with the path laid out in conceptual terms the decisionmaker need commit to nothing more than concepts as in the cases at bar. A device of that sort simply does not comport with the language of the statute, the intent of Congress, or the CEQ regulations. Certainly it is contrary to the requirements of 40 C.F.R. §1505.2(c) which direct the decisionmaker to state whether "all practicable means to avoid or minimize environmental harm" from the selected alternative have been adopted and if not, why not. By failing to pursue mitigation planning at an early stage, neither the Corps of Engineers nor the Forest Service was in a position to comply with that obligation.

## II. Proposals For Major Federal Action Which Involve Staged Decisionmaking Are Not Exempted By NEPA. The Deferral of Essential Elements Of Mitigation Planning To Later Stages Following Completion Of The NEPA Process And Decision To Authorize Development Is Contrary To The Statute

The court of appeals held that NEPA compliance requires that an agency analyze mitigation measures in detail and explain the effectiveness of the measures. 832 F.2d at 1493; 833 F.2d at 817. These holdings are in perfect harmony with the language of the statute and the CEQ regulations. Indeed, it seems to us that NEPA and the CEQ regulations are instinct with obligation on the part



of the federal agency to deal with mitigation measures in precisely the manner described by the court of appeals.

The government adopts an apocalyptic view of these proceedings. It characterizes the court's requirement that an agency "explain the effectiveness of the measures" as requiring a "demonstrably effective" mitigation plan, and elsewhere accuses the court of appeals of "the construction of a rigid and unwarranted procedural regime for developing mitigation measures." Brief for Petitioner in No. 87-1704, at 14. According to the government, the ruling below would actually impede informed agency decisionmaking by preventing federal agencies from carrying out their resource management responsibilities through systematic project development. Brief for Petitioners in No. 87-1704, at 15.

The principal vice of the rulings below, as identified by the government, is the loss of flexibility by agencies which choose to implement their activities through staged project development. According to this argument, an agency cannot develop a "complete mitigation plan" at the preliminary stages of the decisionmaking process and therefore a requirement to do so would have the perverse effect of (1) encouraging agencies either to invest large sums of money and time before making even preliminary decisions or to defer environmental analysis until far along in the planning process; and (2) discouraging agencies from identifying mitigation measures that may be possible but cannot be guaranteed. Brief for Petitioners in No. 87-1703, at 38. The government's position is at odds with the national policy declared in NEPA.

The overarching principle animating the CEQ regulations is not administrative flexibility but the establishment of uniform procedures to achieve more effectively the congressional purpose of ensuring that environmental factors are integrated into the agency's decisionmaking. 43 Fed. Reg. 55978, 55985-986 (November 29, 1978). Indeed,

the primary CEQ directive with respect to planning is that agencies shall integrate the NEPA process with other planning at the earliest possible time to ensure that planning and decisions reflect environmental values. 40 C.F.R. § 1501.2. There exists a "procedural regime" for developing mitigation measures but it is to be found in section 1501.2, not in the rulings below. That this was the principal aim of Congress has been confirmed by the Court. As stated in *Weinberger* v. *Catholic Action of Hawaii*, the first aim of NEPA is "to inject environmental considerations into the federal agency's decisionmaking process by requiring the agency to prepare an EIS." 454 U.S. at 143.

The government's implicit position in these consolidated cases is that while the NEPA process should be integrated into agency planning at the earliest possible time, mitigation planning can be set aside and dealt with during later stages. In both environmental statements under review, mitigation measures were given "a lick and a promise." Both the Corps and the Forest Service adopted the device of inserting mitigation discussion of a general nature in the EIS while the record of decision contained statements of hope and aspiration but little by way of specific commitment. Thus the 1980 Elk Creek SEIS listed general measures to mitigate impact of the project on wildlife and explained that specific mitigation measures would be developed based upon results of a wildlife compensation plan underway at Applegate Dam, one of the two dams already constructed as part of the Rogue River Basin Project. According to the government, such a discussion of wildlife mitigation "was sufficiently thorough for the decision at hand, whether to proceed with the Elk Creek Dam. The *Statement* identified mitigation measures but left the details to future development." Brief for Petitioners in No. 87-1704, at 12. In like manner, the Forest Service separated mitigation planning from the NEPA process. The Early Winters EIS declared that its treatment of mitigation was conceptual. "The measures



are conceptual and will be made more specific as part of the design and implementation stages of the planning process." Early Winters EIS, at 14.

Mitigation planning is an integral part of the environmental analysis process and, as such, should proceed as a part of that process, not separate from it. CEQ defines the "NEPA process" as all measures necessary for compliance with the requirements of section 2 and Title I of NEPA." 40 C.F.R. §1508.21. Indeed, an explicit purpose of NEPA is the promotion of "efforts which will prevent or eliminate damage to the environment," in effect, mitigation. 42 U.S.C. §4321.

Separating mitigation from the NEPA process for treatment in later stages has generally meant leaving such considerations to the stages of a project when engineering and fiscal constraints are greatest. Congress in 1986 recognized this problem in connection with water resource development, enacting legislation requiring that the Corps of Engineers submit no proposal for authorization of such projects unless accompanied by a specific plan to mitigate fish and wildlife losses. Section 906(d) of the Water Resources Development Act of 1986 provides:

> After the date of enactment of this Act, the Secretary shall not submit any proposal for the authorization of any water resources project to the Congress unless such report contains (1) a recommendation with a specific plan to mitigate fish and wildlife losses created by such project, or (2) a determination by the Secretary that such project will have a negligible adverse impact on fish and wildlife. Specific mitigation plans shall ensure that impacts to bottomland hardwood forests are mitigated in-kind, to the extent possible.

§906(d), 33 U.S.C. §2283(d). We refer to section 906(d) not because the Water Resources Development Act of 1986 controls the consolidated cases but rather because it re-

flects directly on the government's principal argument that the requirement for a specific plan to mitigate wildlife losses will prevent federal agencies from carrying out their resource management responsibilities through systematic project development. Brief for Petitioners in No. 87-1703, at 20. Congress obviously does not subscribe to that view.

Finally, the government argues that CEQ encourages agencies to utilize the practice of tiering environmental impact statements, and asserts further that the Forest Service reasonably concluded, in the Early Winters case, "in accordance with the concept of tiered decisionmaking, that the detailed mitigation measures were not yet ripe for specification, and a general discussion of possible mitigation measures would sufficiently inform its inquiry whether to go forward with the project." Brief for Petitioners in No. 87-1703, at 26, n.25, 31. But this is not a tiering situation.

Tiering of environmental analysis is appropriate at the broad program level, such as regional or areawide plans, where specific environmental impact analysis will be prepared for specific projects when and if subsequently proposed. A programmatic EIS is prepared for the broad program and a site-specific EIS for particular projects. When the tiering concept is applied to a single project such as the Elk Creek dam or the Early Winters ski development, it is apparent that project evaluation will be subject to "piecemealing," the very opposite of comprehensive project evaluation contemplated by NEPA. The longer that mitigation measures remain uncertain, the greater the likelihood that significant irretrievable commitments of time and money will occur, thereby reducing or eliminating the possibility that the project can be modified if mitigation measures have become too costly or technically unfeasible. It is for this reason that CEQ directs agencies to prepare environmental impact statements so as not to commit resources prejudicing selection of alternatives before making a final decision. 40 C.F.R. §1502.2(f).



So far as mitigation measures were concerned, therefore, the agencies in the consolidated cases may have imported the concept of tiering into their decisionmaking but did not agree to prepare a separate EIS for the environmental mitigation measures deemed not yet ripe for review. There may well be single project situations where an EIS can provide direction for mitigation planning, the results of which can then be reviewed in a subsequent environmental impact statement at a later stage. But, so far as amicus can determine, that is not contemplated here. Here the Forest Service adopted only "the concept of tiering" but apparently does not intend to tier from the Early Winters EIS to an EIS relating to mitigation measures. See 40 C.F.R. § 1500.4(i).

## III. Whether Worst Case Analysis or Reasonably Foreseeable Impacts Analysis Is Employed, the Rulings Below Correctly Determined That Information Essential to a Reasoned Choice Among Alternatives Was Incomplete and That Uncertainty Existed

Significant environmental impacts which are reasonably foreseeable are the type of impacts an agency is obligated to analyze in an EIS. In the context of CEQ's regulation dealing with incomplete or unavailable information, 40 C.F.R. § 1502.22, the term "reasonably foreseeable" impacts includes low probability/severe consequence impacts. 51 Fed. Reg. 15618, 15622 (April 25, 1986). CEQ regulations instruct that the absence of complete information concerning reasonably foreseeable significant impacts calls for special treatment in an EIS. Whether that treatment be "worst case" analysis, as indicated by the court of appeals, or reasonably foreseeable impacts evaluation based on theoretical approaches or research methods generally accepted in the scientific community, as urged by the government, we think the courts below were correct in de-

termining that incomplete information and uncertainty triggered special treatment in the EIS.

In No. 87-1703, the Methow Valley mule deer herd now constitutes the largest migratory herd in the state. It provides recreational, aesthetic, and economic values to Washington residents, and significant concern exists that any level of development at Early Winters could drastically alter the ecosystem of the upper Methow Valley. As stated in Department of Wildlife comments on the draft EIS, loss of summer and winter range and blocked migration routes to available ranges will substantially reduce deer numbers. At full site development, the Washington Department of Wildlife anticipated a loss of winter range in excess of fifty percent, far more than the 15 percent loss predicted by the Forest Service. As we noted at the outset, Congress has explicitly recognized the primary authority and responsibility of the state for the management of fish and wildlife on National Forest lands. Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. § 528; § 302(b), Federal Land Policy Management Act of 1976, 43 U.S.C. § 1732(b). In the circumstances, others are entitled to hold views on the efficacy of measures to manage and protect the Methow Valley deer herd but the Department of Wildlife is required by law to make judgments. In its judgment, ultimate impact on the Methow deer herd could exceed a fifty percent reduction in numbers.

Because the Forest Service had in preparation but had not completed a comprehensive mule deer study when the Early Winters EIS was issued, the court of appeals concluded that the cursory discussion of impacts to the mule deer was based on incomplete information. Sending the matter back to the agency, the court of appeals stated that if the comprehensive study still provides incomplete information, a worst case analysis would be required for areas in which information is lacking. 833 F.2d at 818.



In No. 87-1704, the Oregon Fish and Wildlife Department formally criticized the Corps' conclusion that Elk Creek dam would have little effect on temperature and turbidity downstream in the Rogue River. The agency which has responsibility by law to protect and manage the fishery resources of the state specifically disagreed with the Corps' finding that Elk Creek would make only a small contribution to total flow in the Rogue. Because the Corps subsequently acknowledged that Elk Creek could contribute up to twenty-five percent of flow in the Rogue River during periods of high flow, 832 F.2d at 1497, the court of appeals determined that the Corps' assessment of turbidity, a highly significant potential impact with effects on downstream recreational activities, was subject to uncertainty and that the Corps should have included a worst case analysis. 832 F.2d at 1497.

The Supremacy Clause does not admit and we do not suggest that state agencies, regardless of their responsibilities, hold any veto over the federal actions in these cases. Instead, it is the NEPA process that forces action in both cases. Important fish and wildlife resources may be adversely affected and the state agency responsible for the affected resources has raised specific concerns, exposing incomplete information in the Early Winters case and uncertainty in the Elk Creek case with respect to the extent of project impacts. In the circumstances, we think the courts below were correct in determining in the Early Winters case that incomplete information relating to the impacts on the state's largest migratory deer herd would require the Forest Service to deal with the lack of information, not merely deny the existence of impacts. In the Elk Creek case, the information in the internal ODFW memorandum was significant new information and, in light of the intensive study by ODFW of salmon and steelhead in the Rogue River since 1974, the court of appeals was on firm ground in concluding that it was probably accurate and required the Corps to supplement the 1980 statement.

## CONCLUSION

For the reasons set forth above, Amicus Association believes the decisions of the court of appeals in these consolidated cases should be affirmed.

Respectfully submitted,

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# AMICUS CURIAE

# BRIEF

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Nos. 87-1703, 87-1704

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE, *et al.*,
*Petitioners*

v.

METHOW VALLEY CITIZENS COUNCIL, *et al.*,
*Respondents*

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JOHN O. MARSH, JR., SECRETARY OF THE ARMY, *et al.*,
*Petitioners*

v.

OREGON NATURAL RESOURCES COUNCIL, *et al.*,
*Respondents*

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**On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF OF CENTER FOR ENVIRONMENTAL EDUCATION AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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§ 1505.1-.3 (1979) ..... 12, 13, 14
§ 1506.5, .12 (1979) ..... 7, 12
§ 1507.3 (1979) ..... 12
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CEQ, *Environmental Quality—1977* (Eighth Annual Report 1977) ..... 17
CEQ, *Forty Most Asked Questions Concerning CEQ's NEPA Regulations*, 46 Fed. Reg. 18026 (1981) ..... 16
D. Mandelker, *NEPA Law and Litigation* (1984) ..... 10

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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Nos. 87-1703, 87-1704

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F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE, *et al.*,
*Petitioners*

v.

METHOW VALLEY CITIZENS COUNCIL, *et al.*,
*Respondents*

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JOHN O. MARSH, JR., SECRETARY OF THE ARMY, *et al.*,
*Petitioners*

v.

OREGON NATURAL RESOURCES COUNCIL, *et al.*,
*Respondents*

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**On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF OF CENTER FOR ENVIRONMENTAL EDUCATION AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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## ISSUES PRESENTED

1. Was the Court of Appeals' application of the pre-amendment or original version of the Council of Environmental Quality Regulation on incomplete information, 40 C.F.R. § 1502.22 (1979), proper under the grandfather clause of the amended regulation, 40 C.F.R. § 1502.22(c) (1986), when the Notices of Intent to prepare the Environmental Impact Statements were published prior to May 27, 1986?

2. Whether NEPA and its implementing regulations require agency evaluation of mitigation measures in appropriate cases under applicable standards of judicial review?

## STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Center for Environmental Education is a national conservation organization whose purposes include monitoring environmental issues of concern to the general public with special reference to those pertaining to the coastal and marine environment. The Center is supported by approximately 100,000 members nationwide. The Center seeks to educate the public concerning those issues. The Center regularly participates in agency processes under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (1982) (hereinafter "NEPA"), both to inform itself and its supporters about significant environmental issues and to contribute to those processes through the commenting mechanism.

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[1] All parties have consented in writing to the participation of the Center as an amicus pursuant to Rule 36, Revised Rules of the Supreme Court.

Lead counsel for the Center is the former General Counsel of the Council on Environmental Quality responsible for drafting the CEQ NEPA Regulations, 40 C.F.R. Parts 1500-1508 (1979).



## SUMMARY OF ARGUMENT

This brief is confined to two issues, that concerning the appropriate application in these cases of the Council on Environmental Quality's (hereinafter "CEQ") regulation concerning incomplete information and that concerning the role of mitigation under NEPA and its implementing regulations.

With respect to the former issue, under the grandfather clause of the amended Council on Environmental Quality regulation governing incomplete information, 40 C.F.R. § 1502.22(c) (1986), the original or preamendment version of the regulation is to be applied when the Notice of Intent (to prepare an environmental impact statement) was published in the Federal Register prior to May 27, 1986. The Notices of Intent in both the present cases were published prior to that date. That being the case, under the terms of the present, amended regulation, the original regulation governed the environmental documentation in this case. It is that original regulation which the Ninth Circuit applied (albeit without the analysis summarized above), so the decision below should not be overturned.

With respect to the second issue, that of mitigation, both the Ninth Circuit and the Government use language that departs in the first instance from the law and the regulations and the second from the reality of NEPA's implementation. Mitigation is, however, central to implementation of NEPA and the CEQ NEPA Regulations. While the Ninth Circuit's language about the need for a "mitigation plan" is inaccurate as a universal generalization, that court's emphasis on the importance of mitigation and its scrutiny of it are appropriate and necessary to the implementation of the Act.

## ARGUMENT

### Introduction

As outlined in the summary above, this amicus brief is confined to two issues: whether application of the grandfather clause of the CEQ regulation on incomplete information means that the Ninth Circuit applied the proper original regulation and whether, despite excessive language, the Ninth Circuit properly implemented the requirements with respect to mitigation pursuant to NEPA and the CEQ regulations.

### I. The "Worst Case" analysis issue is inappropriately before the court because under the grandfather clause of the "amended regulation", 40 C.F.R. § 1502.22(c), the issue was properly handled in both cases under the earlier, "original" worst case regulation.

The "worst case" issue that was presented as the lead question for review does not belong before this Court. In both the cases which are the subject of the proceeding, under the terms of the "amended" regulation, 40 C.F.R. § 1502.22 (1986), the preamendment or "original" regulation, 40 C.F.R. § 1502.22 (1979), was applicable.[2] Since the Ninth Circuit on both cases proceeded under that origial regulation, according to the grandfather clause of the amended regulation, § 1502.22(c), that court acted in accordance with the requirements of both the original and the amended regulations. There was no error by the Ninth Circuit occasioning review. This issue does not belong before this Court in the present cases.

The pertinent grandfather clause of the amended regulation, § 1502.22(c), states:

[2] In distinguishing between the 1979 regulation and the 1986 regulation, we employ the terms used by the CEQ, terming the former the "original" regulation and the latter the "amended" regulation. 40 C.F.R. 1502.22(c) (1986) (as amended). This amendment to the 1979 CEQ regulations is the only amendment the agency has adopted.



> (c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR § 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

40 C.F.R. § 1502.22(c).[3]

The newly added 40 C.F.R. § 1502.22(c) thus makes the "amended" regulation (as distinguished from the "original" regulation) "applicable to all environmental

[3] The government in its Petitions for Writs of Certiorari in both Nos. 87-1703 and 87-1704 (hereinafter "Petition" or "Petitions") stated as a Question Presented, "Whether the National Environmental Policy Act requires federal agencies to include in each environmental impact statement . . . a 'worst case analysis' of potential environmental harm if relevant information [concerning significant environmental effects] is unavailable or too costly to obtain." Petitions at I (bracketed portion appears only in 87-1703).

The grandfather clause of the amended regulation, 40 C.F.R. § 1502.22(c), is mentioned in neither petition. Indeed, the amended regulation, which is reprinted "in pertinent part" as an appendix to each petition, sets out 1502.22(a) and (b) but omits (c). Petition in No. 87-1703 at 73a-74a; Petition in No. 87-1704 at 70a-71a.

The government also does not discuss the governing grandfather clause in its briefs on the merits, although it does accurately quote the whole of the section in the appendices. Briefs for the Petitioner in No. 87-1703 at 1a-2a and in No. 87-1704 at 1a-2a.

The Brief of Methow Recreation, Inc. asserts that "[i]t is of no consequence that the original version of the 'worst case analysis' requirement was in effect at the time the *Early Winters Study* was prepared," since the Court of Appeals' requirement applied prospectively to a deer herd study initiated in response to the Record of Decision rather than to an earlier document prepared under the original regulation. Brief for Methow Recreation, Inc., at 25 n.23. That assertion represents a misreading of § 1502.22(c) in that that section makes the date of filing of the Notice of Intent determinative rather than the date of preparation of a follow-up document. The Ninth Circuit appropriately followed the original regulation.

impact statements for which a Notice of Intent (40 C.F.R. § 1508.22) is published in the Federal Register on or after May 27, 1986." Such a "NOI" is published as soon as possible after the agency's decision to prepare an EIS and before the "scoping" process. 40 C.F.R. § 1501.7 (1979). This document alerts the public that the EIS is to be prepared and to the "scoping" process, which is the first opportunity for the public to participate in identifying or "scoping" the significant issues that should be studied in the EIS. *See* 40 C.F.R. §§ 1501.7, 1508.22, 1508.25 (1979).

Since the EISs in both cases were prepared well prior to the May 27, 1986, date, the NOIs—which necessarily precede the EISs—were prepared even earlier. The draft environmental impact statement in the *Methow Valley* case was prepared in 1982, and the final environmental impact statement was issued in 1984.[4] *Methow Valley*, 833 F.2d at 812. At the time of the Ninth Circuit's consideration of the *Methow Valley* case, the Forest Service was in the process of preparing a detailed and comprehensive study of the mule deer. *Id.* at 817. The Forest Service was to evaluate the results of that study when complete. If the study still provided incomplete information on the mule deer, the Court said a worst case analysis would be necessary. *Id.* at 818. Presumably if the information were complete, no such analysis would be required, and the Forest Service could proceed to make a fully informed decision. There is nothing in the chronology or analysis which results in the NOI in the *Methow Valley* case occurring after the 1986 cut-off date. *See* § 1502.22(c) (1986) (as amended). The amended regulation allows agencies to "choose to comply with the requirements of either the original or amended regulations" for "environmental impact statements in progress." *Id.*

[4] A "Record of Decision" adopting a "future management plan" was also adopted in 1984. *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 812 (9th Cir. 1987).



Here, no environmental impact statement was in progress. It had been completed. What was in progress was a non-NEPA mule deer study the results of which might or might not have resulted in a need for further analysis.[5] Under the terms of the amended regulation, the amended regulation does not apply to the *Methow Valley* case. The Court of Appeals properly proceeded under the original regulation.

In *Oregon Natural Resources Council* v. *Marsh*, 832 F.2d 1489, 1492 (9th Cir. 1987), the final EIS was filed in 1971. A draft supplemental EIS[6] was filed in 1975, and a revised draft supplemental in 1980. *Id.*[7] Thereafter, the comments on this document and responses to them were placed in a separate section and the aggregate released as the final supplemental EIS. *Id.* The Record of Decision was signed in 1984, and the litigation commenced in 1985. Opinion and Order of the Magistrate, appearing as Appendix B to Petition in No. 87-1703 at 20a-21a.

[5] While the body of the Ninth Circuit's discussion covers the mule deer study which, depending on the results, might lead in turn to a worst case analysis being required, there was no requirement for a new EIS. *Methow Valley*, 833 F.2d at 816-818. The portion of the opinion dealing with mitigation requires a fuller discussion of mitigation, which in effect requires an addition to the existing EIS. The district court is then directed to enter "appropriate relief in accordance with this opinion." *Id.* at 820. A footnote in the mitigation discussion refers to a new EIS having to be prepared, *id.* at 819 n.13, but that form of relief does not follow from the substantive discussion.

However, whatever is ordered by the Court with respect to future studies, it must not be forgotten that what is under review in this case is the past EIS that is in the administrative record. That EIS is, according to the amended regulation, to be reviewed under the original regulation. § 1502.22(c) (as amended).

[6] The requirements with respect to supplemental EISs are set out in 40 C.F.R. § 1502.9(c) (1979).

[7] The CEQ NEPA Regulations, including the original § 1502.22, were effective July 30, 1979. 40 C.F.R. § 1506.12 (1979).

Here again, as in *Methow Valley*, the Ninth Circuit panel did not directly require a worst case analysis, but rather instructed the agency to consider two new studies and to take the information in them "into account in its decision concerning a worst case analysis." *Oregon Natural Resources*, 832 F.2d at 1497. If uncertainty then remained, either further research or a worst case analysis would be warranted. *Id.*

Again—as in *Methow Valley*—the document under review, the EIS, was prepared well in advance of the effective date of the amended § 1502.22. By the terms of the amended regulation the original regulation applies. § 1502.22(c) (as amended).

The government is right in saying that deference is due CEQ and that the CEQ NEPA Regulations govern. Briefs for the Petitioner in No. 87-1703 at 21-22 and in No. 87-1704 at 16. Those regulations require application of the original § 1502.22, which is what the Ninth Circuit applied. There is no issue appropriately before this Court concerning worst case analysis. Amicus respectfully suggests that, as to the worst case issue, this Court either decide that *certiorari* was improvidently granted or that it summarily dispose of the issue without extended discussion of the merits of a regulation repealed two years ago and of ever-diminishing applicability.

## II. Both the Government and the Ninth Circuit err in the breadth of their assertions respecting the role of mitigation under NEPA. The role is, nevertheless, central to implementation of the Act and the CEQ Regulations.

In both cases under review, Judge Ferguson spoke of a "complete mitigation plan." *Methow Valley*, 833 F.2d at 820; *Oregon Natural Resources Council*, 832 F.2d at 1493. While the context of each case supports an appropriate emphasis on the importance of mitigation, the wording quoted above exceeds what NEPA and its implementing regulations actually specify. The Government posed as a question presented in both cases whether NEPA "requires federal agencies to include in each environmental impact statement . . . a fully developed plan to mitigate environmental harm . . . ." Briefs for the Petitioners in No. 87-1703 at I and No. 87-1704 at I. The Government then went on to characterize the Court of Appeals' somewhat excessive language as a "novel interpretation" that would "profoundly alter the federal agencies' [compliance] obligations." Briefs in No. 87-1703 at 19 and No. 87-1704 at 14 (bracketed portion appears only in No. 87-1703). The Government bewailed "inflexible new procedural requirements" which are "foreign to NEPA . . . ." Briefs in No. 87-1703 at 25 and in No. 87-1704 at 18.



Nonsense. Mitigation is, as a matter of routine, discussed—as it should be—in the vast preponderance of federal agency NEPA statements and processes. Use of the "profound alteration" language suggests the hand of one more familiar with the hyperbole of brief writing than with the actual implementation of the Act. Mitigation is essential to NEPA's operation; in fact, the agencies appropriately employ mitigation in most cases.

### A. *Mitigation is an essential element of the statute.*

NEPA's own terms—without using the word "mitigation"—require the identification and explication of it. Subsection 102(2)(C)(i) requires analysis in environmental impact statements[8] of the "environmental impact of the proposed action" while the immediately following subsection, § 102(2)(C)(ii), requires discussion of "any adverse environmental effects which cannot

[8] The environmental impact statement required by § 102(2)(C) of NEPA is one of the "action-forcing" procedures devised by Congress to insure that the policies of its enactment are implemented. *See Andrus* v. *Sierra Club*, 442 U.S. 347, 350 (1979); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 409 (1976); 40 C.F.R. § 1500.1(a) (1979).

be avoided should the proposed be implemented . . . ." [9] Since environmental "impact" and environmental "effect" are synonymous,[10] it is the difference between the two sections—the impacts which can be avoided—that is the required discussion of mitigation. In effect, (C)(i) minus (C)(ii) equals mitigation—what is done to avoid environmental impacts.[11] This concept—mitigation—is defined for purposes of NEPA as follows:

§ 1508.20 Mitigation.

"Mitigation" includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

[9] In the words of a leading text-writer, "NEPA implicitly requires the discussion of mitigating measures in impact statements by requiring the discussion of 'any adverse environmental effects which cannot be avoided.'" D. Mandelker, *NEPA Law and Litigation*, § 10:30 (1984) (quoting NEPA § 102(2)(C)); *see Prince George's County* v. *Holloway*, 404 F.Supp. 1181, 1187 (D.D.C. 1975).

[10] The terms "environmental impact" and "environmental effect" are used synonymously in implementing NEPA. 40 C.F.R. § 1508.8.

[11] NEPA includes among its purposes the encouragement of "productive and enjoyable harmony between man and his environment . . ." as well as the promotion of efforts to "prevent or eliminate damage to the environment . . . ." NEPA, § 2. The Congressional declaration of the National Environmental Policy includes the creation and maintenance of conditions "under which man and nature can exist in productive harmony . . . ." § 101(a). It is this duality, this recognition of the balancing of multiple interests, that permeates NEPA. The next following section, 101(b), requires the government to "use all practicable means consistent with other considerations of national policy" to ensure Americans an environment that is at once "safe" and "productive," § 101(b)(2); that promotes the "widest range of beneficial uses of the environment without degradation . . ." § 101(b)(3); and that will "achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities . . . ." § 101(b)(5).



(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

40 C.F.R. § 1508.20.

In the real world of NEPA implementation mitigation is essential to the operation of the statute. While a great hue and cry is apt to attend a decision to approve or to block some massive and controversial proposal, for the vast preponderance of projects such all-or-nothing decisions are not what occurs. Projects are neither approved with what are often their initial environmentally obliv-ious impacts nor are they scuttled because they cause some environmental harm. Rather, the concept of mitigation permits the accommodation of multiple and even conflicting values. Projects are approved, but as part of the approval processes their environmental harms are lessened or removed. The impacts are, in short, mitigated. Both environmental betterment and other legitimate objects of human pursuit and public concern are through mitigation accommodated and given their due weight by agencies exercising the discretion entrusted to them. Mitigation thus benefits both environmental values —in that those values are furthered by the measures that are adopted—and developmental values—in that projects are enabled to proceed once their environmental impacts have been mitigated.

### B. *Mitigation is an essential element of the CEQ NEPA Regulations.*

The CEQ's NEPA Regulations, 40 C.F.R. Parts 1500-1508,[12] reflect the importance of mitigation. After de-

[12] This Court has characterized the CEQ NEPA Regulations as a "single set of uniform, mandatory regulations . . . ." *Andrus* v.

termining the scope of a study and resulting document, 40 C.F.R. §§ 1508.25(b), 1501.7, mitigation must be discussed in at least one of two places in the environmental impact statement.[13] § 1502.14(f) (dealing with alternatives) requires agencies to "[i]nclude appropriate mitigation measures not already included in the proposed action or alternatives."[14] Sec. 1502.16(h) (dealing with

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*Sierra Club*, 442 U.S. 347, 357 (1979). The Court described their adoption through a "detailed and comprehensive process, ordered by the President, of transforming advisory guidelines into mandatory regulations applicable to all Federal agencies." *Id.*, at 358. "CEQ's interpretation of NEPA," said this Court, "is entitled to substantial deference." *Id.*

[13] Chronologically the NEPA process, *see* 40 C.F.R. § 1508.21, as applied to a specific "major Federal action[] significantly affecting the quality of the human environment," 40 C.F.R. § 1502.3, begins with early planning, 40 C.F.R. § 1501.2, and includes: a decision as to what agency or agencies will prepare what sort of environmental document, 40 C.F.R. §§ 1501.3-1501.6, 1508.10; a "scoping" process designed to determine the scope of an environmental impact statement if one is to be prepared, 40 C.F.R. § 1501.7; preparation of a draft statement, 40 C.F.R. § 1502.9(a); receipt of comments on the draft, 40 C.F.R. Part 1503; preparation of final statement, 40 C.F.R. § 1502.9(b); possible referral to CEQ, 40 C.F.R. Part 1504; followed by the agency's review process, 40 C.F.R. § 1505.1 (1979). The agency prepares a concise record of decision, 40 C.F.R. § 1505.2, and in appropriate cases insures that its decision is implemented. 40 C.F.R. § 1505.3.

The Government's outline of the role of mitigation under the CEQ NEPA Regulations is a complete one. Briefs in No. 87-1703 at 28-30 and in No. 87-1704 at 20-23.

[14] The precise language in the Regulation is conscious, acknowledging that mitigation may be already included in a proposal. 40 C.F.R. § 1502.14(f); *see also* 40 C.F.R. § 1508.25(b)(3). Sometimes applicants—often particularly enlightened or well-advised applicants—will meet informally with government agencies prior to submission of an application to learn about and address those agencies' environmental concerns. (The CEQ NEPA Regulations encourage such early cooperation. *See* 40 C.F.R. §§ 1501.2(d), 1506.5(a), 1507.3(b)(1)



environmental consequences) requires discussion of "[m]eans to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f))." If another agency which also has jurisdiction over a project objects to the impacts discussed in the draft statement, that agency is required in its comments to "specify the mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirements . . . ." 40 C.F.R. § 1503.3(d) (1979). In this way the final statement can contain a fuller and more adequate discussion of the impacts and their ramifications, while the prospect of the second agency with jurisdiction issuing an unforeseen denial after the first agency has approved the project is averted.

Finally, when the lead agency makes its decision, it must state in its Record of Decision whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. 40 C.F.R. § 1505.2(c). The Regulation further provides:

> A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

*Id.* At minimum, these requirements force the decisionmaker to focus on the environmental process that has gone before and to reflect the teachings of that process

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(1979). These preapplication discussions may take place over many months. An applicant may choose to incorporate all the environmentally beneficial suggestions made by the agencies into the application before its formal submission (i.e., to include them in the "proposed action"). Unless public comment or further study results in additional such measures which the agencies then adopt, all of what the agencies would otherwise have imposed as mitigation will have been incorporated into the applicant's proposal, obviating the need for additional, discrete mitigation. Clearly this sort of public-private cooperation goes far to further NEPA's ends in a consensual, nonadversarial manner.

in his or her decision.[15] Finally, once an agency has adopted mitigation measures, 40 C.F.R. § 1505.2(c), the agency must see that such measures are in fact carried out. 40 C.F.R. § 1505.3.[16]

### C. *Mitigation is an essential element of the actual operation of NEPA.*

An illustrative list of NEPA cases provides examples of how mitigation has been employed as part of project approval processes:

- Airport runway extension approved; mitigation involved a preferential runway use program to direct flights away from dense residential populations and changes to takeoff procedures such that aircraft overflew those populations at higher altitudes. *C.A.R.E. Now, Inc.* v. *FAA*, 844 F.2d 1569, 1571, 1575 (11th Cir. 1988). In its opinion the Court of Appeals observed:

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[15] The requirement also rescues NEPA from the charge of "useless paperwork" that arose shortly after the law's enactment by insuring that attention is paid to the environmental impact statement that Congress so expectantly created. *See supra* note 8.

[16] 40 C.F.R. § 1505.3, *Implementing the decision*, provides in pertinent part:

> Mitigation . . . and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:
>
> (a) Include appropriate conditions in grants, permits or other approvals.
>
> (b) Condition funding of actions on mitigation.
>
> (c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.
>
> (d) Upon request, make available to the public the results of relevant monitoring.



> In conclusion, the utility of NEPA is apparent in this case. Without NEPA, the FAA would not likely have imposed mitigation measures as conditions for the completion of the runway extension. With NEPA, however, the FAA was forced to consider the environmental consequences of its actions. As a result, PDK will experience enhanced safety with insignificant environmental consequences due to the implementation of effective mitigation measures.

Id. at 1575.

- Dam construction allowed to proceed; mitigation included increasing minimum flows to preserve aquatic habitat and related fishery and obtaining borrow material from the reservoir site rather than from the downstream canyon bottom so as to preserve downstream water quality. *Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1280, 1284 (9th Cir. 1974).
- Channel improvement; project may proceed contingent on approval by Court of mitigation summary covering such matters as areas to be preserved and provision for water supply. *Simmans* v. *Grant*, 370 F. Supp. 5, 20-22 (S.D.Tex. 1974).
- Shopping mall approved; mitigation involved detention basins for storm runoff which includes wetlands; new bed for creek; creation of compensatory wetlands. *Sierra Club* v. *Alexander*, 484 F.Supp. 455, 460, 468 (N.D.N.Y.), *aff'd*, 633 F.2d 206 (2d Cir. 1980).
- Office, commercial, and residential development approved; mitigation involved permanent protection for 86% of the habitat of an endangered butterfly.[17] *Friends of Endangered Species, Inc.* v. *Jantzen*, 760 F.2d at 984.

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[17] The conservation plan in this case, the result of long and productive negotiations among affected interests, was described in a Congressional Committee report as a model for other such plans. *Friends of Endangered Species, Inc.* v. *Jantzen*, 760 F.2d 976, 983 (9th Cir. 1985).

- Conversion of military airport to civilian uses; mitigation measures to deal with increased noise levels. *Davidson* v. *Department of Defense*, 560 F. Supp. 1019, 1029-31 (S.D.Ohio. 1982).
- Mineral exploration upheld in wilderness area; mitigation involved curtailment of helicopter flights and of overnight camping and seasonal restrictions on drilling activities. *Cabinet Mountains Wilderness* v. *Peterson*, 685 F.2d 678, 680-684 (D.C.Cir. 1982).[18]

Supposedly mitigative conditions may, of course, fail to mitigate or the record may not afford adequate information concerning them. In such cases courts have required more detailed analyses of mitigation measures. In a case, for instance, where mitigation had been offered as justification for nonpreparation of an EIS,[19] Judge Wallace observed that "[t]he conditions contained in this permit . . . rather than mitigating environmental consequences, generally operate simply to defer important agency decision until more information has been obtained." *Jones* v. *Gordon*, 792 F.2d 821, 829 (9th Cir. 1986); *see Sierra Club v. Peterson*, 717 F.2d 1409, 1411,

[18] The *Cabinet Mountains* case also involved a distinct question on which there is a sharp division of authority and which is not presented in this proceeding—whether mitigation may without undermining NEPA be sufficiently total to obviate the need for an environmental impact statement. The CEQ has cast doubt on the practice. CEQ, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026, 18038 (1981); *see Sierra Club* v. *Marsh*, 769 F.2d 868 (1st Cir. 1985). However, the practice has been upheld in four circuits. *C.A.R.E. Now, Inc.* v. *FAA*, 844 F.2d at 1575; *Louisiana* v. *Lee*, 758 F.2d 1081, 1083 (5th Cir. 1985); *Cabinet Mountains*, 685 F.2d at 682; *Preservation Coalition, Inc.* v. *Pierce*, 667 F.2d 868, 874 (9th Cir. 1982). Despite the government's invitation, Briefs for the Petitioners in No. 87-1703 at 27, n.26, and in No. 86-1704 at 20, n.10, the question is not presented in the present cases, and they do not provide the appropriate occasions to address it.

[19] See *supra* note 18.



1415 (D.C. Cir. 1983) (department cannot delay preparation of EIS because of inadequate information if it is unable to preclude activities occurring during that delay which might have unacceptable environmental consequences). The sufficiency or insufficiency of mitigation can go to the very basis for the reasoned choice among alternatives which it is a purpose of NEPA to illuminate. In an early NEPA case the Eighth Circuit observed that "[t]he proposed mitigation plans go to the very heart of the question before the Corps in preparing its environmental impact statement—whether the project should proceed at the present time in view of its environmental consequences." *Environmental Defense Fund, Inc.* v. *Froehlke*, 473 F.2d 346, 351 (8th Cir. 1972).[20] The EIS must necessarily examine the mitigation measures in detail, as any other aspect of environmental impact analysis is examined in the "detailed statement," NEPA, § 102(2)(C) that we have come to call an environmental impact statement. *See LaFlamme v. FERC*, 842 F.2d 1063, 1071 (9th Cir. 1988); *Northwest Indian Cemetery Protection Ass'n* v. *Peterson*, 795 F.2d 688, 697 (9th Cir. 1986); *see also The Steamboaters* v. *FERC*, 759 F.2d 1382, 1393 (9th Cir. 1985); *cf. Texas Committee on Natural Resources* v. *Marsh*, 736 F.2d 262, 268 (5th Cir. 1984).

[20] It is not necessary to delve into larger and separate questions concerning the measure of NEPA's substantive obligations in addition to its essentially procedural mandate; Briefs for the Petitioner in No. 87-1703 at 21 *et seq.* and in No. 87-1704 at 15 *et seq.*; *see* 40 C.F.R. § 1500.1 (concerning procedural and substantive requirements of NEPA); CEQ, *Environmental Quality-1977* (Eighth Annual Report) at 119-121 (1977); in order to appreciate the central role that mitigation plays in the preponderance of environmental impact statements and processes.

In sum, while a "mitigation plan" is not required either by NEPA or by the CEQ Regulations in every case, mitigation is an essential element of NEPA, its implementing Regulations, and the day-to-day implementation of the Act. Indeed, in some cases such a plan may be needed, but not in all. In any event, appropriate mitigation must be examined in sufficient detail in an environmental impact statement to insure that the "action forcing" purposes[21] Congress intended are respected. The presence of the potential for judicial scrutiny deters those who would ignore or pay only lip service to those purposes, upsetting the balance which NEPA enables between environmental and developmental concerns. It is exactly this sort of scrutiny which the court below sought to apply in finding insufficient the mitigation measures proposed by the Corps in *Oregon Natural Resources Council* and by the Forest Service in *Methow Valley*. Requiring agencies to provide detailed analyses of mitigation measures and to explain the effectiveness of such measures does not necessarily mean, however, that agencies must on all occasions produce complete mitigation plans. Here, despite excessive language, the Ninth Circuit's holdings do properly recognize the significance of the mitigation element in a NEPA analysis, especially, as in the cases below, where the mitigation measures proposed by the agencies were so central to the agencies' final decisions.

Respectfully submitted,

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[21] *See supra* note 8.

# AMICUS CURIAE

# BRIEF

No. 87-1703, 87-1704

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1988

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE, et al.,
*Petitioners,*

vs.

METHOW VALLEY CITIZENS COUNCIL, et al.,
*Respondents.*

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, et al.,
*Petitioners,*

vs.

THE OREGON NATURAL RESOURCES, COUNCIL, et al.,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS

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## QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act ("NEPA") allows federal agencies to avoid detailed analysis of mitigation measures by merely listing mitigation "opportunities" in an environmental impact statement or by postponing evaluation of such measures until after proposed projects have been approved.

2. Whether federal agencies may escape strict compliance with NEPA's procedural requirements in defiance of the "rule of reason" standard adopted by the Council on Environmental Quality ("CEQ").

3. Whether federal agencies must continue to take a "hard look" at the potential costs and environmental consequences of proceeding in the face of uncertainty in accordance with the NEPA "common law" adopted by CEQ.

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No. 87-1703, 87-1704

# In the Supreme Court

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# United States

OCTOBER TERM, 1988

F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE, et al.,
*Petitioners,*

vs.

METHOW VALLEY CITIZENS COUNCIL, et al.,
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*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS

**State of Californi John K. Van De Kamp, Attorney General of California and the States of Alabama, Alaska, Colorado, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, Nevada, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Virginia and West Virginia**

## INTEREST OF AMICI

The twenty-eight states appearing as amici curiae herein have a vital interest in protecting their ability to participate meaningfully in the National Environmental Policy Act (42 U.S.C. §§ 4321 et. seq.; "NEPA") process. The federal agency petitioners are attempting to paint a gloss of extremism on the decisions of the court of appeals in an attempt to obscure their goal of dramatically weakening the obligation of all federal agencies to fully comply with NEPA. The Forest Service and the Army Corps of Engineers seek nothing less than to disturb the settled expectations of the states participating in the NEPA process.

The implementation of NEPA is a primary means by which states make their voices heard in the development of federal projects. The environmental impact research, review and disclosure procedure required by NEPA is essential to the states' abilities to plan for the consequences of federal actions.[1] Federal actions, both on and off the federal lands, significantly affect state resources, and increasingly state and local governments are asked to bear the burden of mitigating the consequences of these activities.

The states are particularly concerned with the outcome of these two actions because of the egregious violations of basic NEPA law committed by the federal agencies. In *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810 (9th Cir. 1987), *cert. granted*, No. 87-1703 (June 27, 1988), the Forest Service allocated public lands to the construction of a major destination ski resort with significant adverse air quality and wildlife impacts. The environmental impact statement ("EIS") prepared for the project merely provides a *list* of mitigation "opportunities" that could be implemented by state and county governments or private landowners, without any estimate of their costs, any analysis of their effectiveness or any assurances that the mitigation measures

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[1] The legislative history of NEPA is replete with references about the need to involve state and local governments in the environmental planning and decisionmaking process. H. Rep. No. 378, 91st Cong., 1st sess. 3-4; H. R. Conf. Rep. No. 765, 91st Cong., 1st sess. 8-9; reprinted in 1969 U.S. Code Cong. & Admin. News 2751, 2753-54, 2769.

will be carried out. No specific mitigation measures were described in the Early Winters Environmental Impact Statement ("Early Winters EIS"), even though the Forest Service's regulations require the special use permit to contain terms and conditions which will "minimize damage . . . to fish and wildlife habitat and otherwise protect the environment." 36 C.F.R. § 251.56(a)(1988).[2]

In *Oregon Natural Resources Council v. Marsh*, 820 F.2d 1051 (9th Cir. 1987), *cert. granted*, No. 87-1704 (June 27, 1988), the U.S. Army Corps of Engineers ("Corps") failed to publicly review or analyze new information that challenged important assumptions in the Corps' prior environmental review *before* deciding to proceed with construction of the Elk Creek dam. A 1980 study by the U.S. Soil Conservation Service ("SCS") directly contradicted the Corps' assumptions regarding the turbidity of the water to be released from the Elk Creek dam. *Compare Elk Creek SEIS ("Elk Creek SEIS")* 74, with Borine Testimony, Transcript of January 16, 1986, Hearing on Motion for Preliminary Injunction 32-35, 46-47, 69. A 1985 study by the Oregon Department of Fish & Wildlife ("ODFW") found substantial increases in salmon mortality resulting from a similar Corps' project, Lost Creek dam, and requested more time to study the phenomenon. The Corps responded to this request with a Supplemental Information Report ("SIR") prepared three months *after* this litigation was commenced. The Corps also expressly postponed any study of the costs or effectiveness of mitigation measures for the project's destruction of 1,290 acres of wildlife habitat until after the final decision to build the dam was carried out. *Elk Creek SEIS* 6, Summary ¶ 3.

Should this Court decide that a federal agency need not evaluate the means by which impacts on state resources will be mitigated before deciding to go ahead with federal projects, it will sanction a "build now, study later" attitude in federal agencies. Similarly, a decision revoking the application of the "rule of reason" to the review of federal agency compliance with NEPA's

[2] *See also id.* at § 251.54(e)(4) (1988) (requiring mitigation plans to be submitted at the time of an *application* for a special use permit).



procedural requirements will diminish the ability of state agencies to obtain information about the real costs of mitigating federal actions. Without strict procedural compliance with NEPA, federal agencies will be allowed to treat the loss of state resources as insignificant issues that can be studied after the agency's decision to proceed is final and its development agenda is complete.

Amici urge this Court to reject the radical shifts in established NEPA practice sought by the federal agencies, and to support the states' settled expectations that federal agencies must take a "hard look" at the consequences of their actions and that the federal courts will strictly enforce federal agency compliance with NEPA.

## STATEMENT OF THE CASE

Amici adopt respondents' statements of the cases.

## SUMMARY OF ARGUMENT

1. NEPA's requirement of a detailed environmental impact statement is designed to evaluate means of avoiding harm to the environment. The statute's implementing regulations make discussion of mitigation measures in an EIS mandatory, and this Court's "hard look" doctrine requires that such measures be analyzed in detail to insure a fully-informed and well considered agency decision. Simply listing mitigation "opportunities" in an EIS or postponing any analysis of such measures until after a project has been approved violates NEPA's directives.

2. NEPA commands compliance with its "action-forcing" procedures "to the fullest extent possible." (42 U.S.C. § 4332.) This statutory standard governing NEPA's procedural requirements affords agencies less discretion than they have in their policy making roles reviewed under the standards of § 706 of the Administrative Procedure Act ("APA"). The Council on Environmental Quality ("CEQ") has adopted the traditional NEPA standard of review, "the rule of reason," and this Court should affirm CEQ's decision.

3. The Court should affirm CEQ's adoption of the NEPA "common law" governing federal agency obligations to take a "hard look" at the uncertain, but potentially severe, consequences of their actions.

## ARGUMENT

The federal agencies petitioning this Court seek to change the fundamental premises of the NEPA planning process. The result sought by petitioners is an inversion of the basic NEPA principle to plan and study first, then decide and build after reasoned review of the information gathered. Both the Army Corps and the Forest Service attempt to avoid the "hard look" NEPA mandates by deciding to commit resources to their projects now, and leaving the study of the ultimate effects on fish, wildlife and air quality to a later date. Such actions fly in the face of Congress' intent in enacting NEPA to obtain better environmental decisions by insisting on a thorough and detailed planning process.

Even more radical is the federal government's thesis that agency compliance with NEPA's procedural requirements is delegated to agency discretion. NEPA achieves Congress' goals for the Nation's environment by commanding procedural compliance to the "fullest extent possible". Neither this Court nor any other has ever held that compliance with NEPA's procedures and the CEQ's implementing regulations lies within the agency's special expertise and in fact such a holding would be directly contrary to the purposes of Congress in crafting section 102 of the statute (42 U.S.C. § 4332). The Forest Service and Corps seek to obtain from this Court what they cannot obtain from Congress, a license to ignore NEPA's "hard look" when the agency views it to be inconvenient.



## I

## FEDERAL AGENCIES CANNOT AVOID NEPA'S REQUIREMENT OF A DETAILED STATEMENT BY SIMPLY LISTING MITIGATION "OPPORTUNITIES" IN AN EIS OR BY POSTPONING ANALYSIS OF MITIGATION MEASURES UNTIL AFTER A PROJECT HAS BEEN APPROVED

In both cases before the Court, federal agencies prepared environmental impact statements without discussing or analyzing mitigation measures. The agencies defend these omissions by stating that they can simply list mitigation "opportunities" in an EIS or defer preparation of the measures until after the projects have been approved. These positions are inconsistent with the spirit and letter of NEPA.

### A. NEPA Is Designed To Minimize Harm to the Environment

NEPA was adopted by Congress in response to mounting concerns about the degradation of the nation's environment and the need to conserve our resources for future generations. *See* S. Rep. No. 296, 91st Cong., 1st sess. 4-6, 8-10, 16-17 (1969); H. Rep. No. 378, *supra*, at 3 (1969). As this Court has explained, the statute "announced a national policy of environmental protection and placed a responsibility upon the Federal Government to further specific environmental goals by all practicable means, consistent with other essential considerations of national policy." *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976). "NEPA was designed to promote human welfare by alerting government actors to the effect of their proposed actions on the physical environment." *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983).

NEPA sets forth significant environmental goals for the Nation. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978); *Metropolitan Edison Co.*, 460 U.S. at 772-73 ("NEPA states its goals in sweeping terms of human health and welfare."). Speaking in "bold strokes", *Andrus v. Sierra Club*, 442 U.S. 347, 349 (1979), Congress described the purposes of this Act as follows:

> "To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." 83 Stat 852, 42 U.S.C. § 4321.

Foremost among NEPA's objectives is the prevention of harm to the human environment. This Court has found that the intent of Congress is reflected in the remarks of two principal sponsors of NEPA: " 'What is involved [in NEPA] is a congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of mankind: That *we will not intentionally initiate actions which do irreparable damage to the air, land and water* which support life on earth.' 115 Cong. Rec. 40416 (1969) (remarks of Sen. Jackson) (emphasis supplied)." Under NEPA, " 'we can now move forward *to preserve and enhance our air, aquatic, and terrestrial environments* . . . to carry out the policies and goals set forth in the bill to provide each citizen of this great country a healthful environment.' *Id.*, at 40924 (remarks of Rep. Dingell) (emphasis supplied)," *quoted* in *Metropolitan Edison Co.*, 460 U.S. at 772-73.

NEPA's key, "action-forcing" requirement is the preparation of an environmental impact statement. For every major federal action significantly affecting the environment, agencies must prepare a detailed statement discussing the project's environmental impacts, adverse effects which cannot be avoided should the proposal be implemented, and alternatives to the proposed action. § 102(2)(C). This provision was intended to profoundly restructure the decisionmaking process of federal agencies:

> "The thrust of § 102(2)(C) is thus that environmental concerns be integrated into the very process of agency decisionmaking. The 'detailed statement' it requires is the outward sign that environmental values and consequences have been considered during the planning stage of agency actions [footnote]. If environmental concerns are not interwoven into the fabric of agency planning, the 'action-forcing' characteristics of § 102(2)(C) would be lost." *Andrus v. Sierra Club*, 442 U.S. at 350-51.



Agencies must comply with this statutory directive—and all other requirements of NEPA § 102—to the "fullest extent possible." 42 U.S.C. § 4332; *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787 (1976). This Court has explained that this language used by Congress "is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not to be shunted aside in the bureaucratic shuffle." *Id.*

### B. CEQ's Regulations Require That Mitigation Measures Be Fully Discussed and Evaluated in an EIS

In 1978, the President ordered the Council on Environmental Quality (CEQ) to "issue regulations to Federal agencies for the implementation of the procedural provisions of the Act [NEPA] (42 U.S.C. § 4332(2)) . . ." Exec. Or. 11991(1), (1977). The regulations promulgated by CEQ are binding on all federal agencies. *Andrus v. Sierra Club*, 442 U.S. at 358.

CEQ's regulations emphasize meaningful disclosure and agency consideration of means to avoid environmental harm, including mitigation. Federal agencies are directed, to the fullest extent possible, to "identify and assess reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment." 40 C.F.R. § 1500.2(e) (1987). Decisionmakers must also affirmatively consider whether mitigation measures and other alternatives can be implemented; they are enjoined to "[u]se all practicable means . . . to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment." *Id.* at § 1500.2(f)

CEQ's regulations attach considerable importance to mitigation measures, requiring that agencies discuss them at three separate points in the NEPA process: in defining the scope of an EIS (as an alternative to the proposed project), 40 C.F.R. § 1508.25(b); in the body of the EIS itself, *id.* at §§ 1502.14(f);

1502.16(h); and in the agency record of decision, *id.* at § 1505.2(c). In the EIS, mitigation measures are considered part of the agency's discussion of alternatives, which CEQ describes as "the heart" of the document. *Id.* at § 1502.14. Along with other alternatives to the proposed project, mitigation measures must be "rigorously explore[d] and objectively evaluate[d]," *id.* at § 1502.14(a), and presented in "comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." *Id.* at § 1502.14.

Decisionmakers must be given sufficiently detailed information about the mitigation measures discussed in an EIS to decide whether or not to adopt them as part of the project.[3] Agencies are required to state in their final record of decision whether all practicable means to avoid or minimize environmental harm from the alternative selected, including mitigation, have been adopted, and if not, why not. *Id.* at § 1505.2(c). Where mitigation has been adopted, agencies must adopt (and summarize in the record of decision) a monitoring and enforcement program for such measures. *Id.*; *see also id.* at § 1502.1.

In adopting the NEPA regulations, CEQ clearly envisioned that an EIS would contain a thorough discussion of mitigation measures, including whether or not these measures will actually reduce a project's harmful impacts:

> "to ensure that environmental effects of a proposed action are fairly assessed, the probability of the mitigation measures being implemented must also be discussed. Thus the EIS and Record of Decision should indicate the likelihood that such measures will be adopted or enforced by the responsible agencies." *Forty Most Asked Questions*, 46 Fed. Reg. 18032 (1981).[4]

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[3] "An environmental impact statement is more than just a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions." 40 C.F.R. § 1502.1 (1987).

[4] Although the courts have split on the question of whether CEQ's *Forth Most Asked Questions* constitutes controlling authority, *compare*



### C. This Court's "Hard Look" Doctrine Requires a Full Discussion and Evaluation of Mitigation Measures in an EIS

This Court has endorsed NEPA's "common law"[5] command that agencies take a "hard look" at the environmental consequences before proceeding with a major action. *Kleppe v. Sierra Club*, 427 U.S. at 410 n. 21 (1976); *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983). An agency's "hard look" must be sufficient to satisfy NEPA's twin aims: first, of providing the agency with sufficient information about every significant aspect of the environmental impact of a proposed action to insure a "fully informed and well considered decision," *Vermont Yankee*, 435 U.S. at 553, 558; *Baltimore Gas & Electric*, 462 U.S. at 97; second, of ensuring that the agency will inform the public that it has considered environmental concerns in its decisionmaking process. *Id.*

Lower courts following this Court's directive and developing the NEPA "common law" have required that all significant components of an EIS be detailed and carefully analyzed.[6] This same standard governs mitigation, which is a mandatory element

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*Sierra Club v. Marsh*, 769 F.2d 868, 874, 879 (1st Cir. 1985) (controlling authority) with *Louisiana v. Lee*, 758 F.2d 1081, 1083 (5th Cir. 1985) *cert. denied*, 475 U.S. 1044 (1986) (contra), the CEQ document at least is "guidance" to agencies implementing the CEQ regulations.

[5] *See Kleppe v. Sierra Club*, 427 U.S. at 420-21 (Marshall, J., concurring).

[6] *E.g., Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973) (project impacts); *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072-74 (1st Cir. 1980) (alternatives); *State of Alaska v. Andrus*, 580 F.2d 465, 474-75 (D.C.Cir. 1978), *vacated in non-pertinent part sub nom. Western Oil & Gas Association v. Alaska*, 439 U.S. 922 (1978) (alternatives); *Sierra Club v. Morton*, 510 F.2d 813, 819 (5th Cir. 1975) (history of success of similar projects).

The courts have consistently rejected EIS discussions which are superficial or unsubstantiated. For example, in *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774, 781-82 (9th Cir. 1980), Judge Kennedy explained that an EIS was inadequate because its discussion of several environmental impacts was "conclusory and abbreviated." *Id.* at 782 n. 3. "We conclude that the EIS fails to give decisionmakers who

of an EIS, and which must be fully described and evaluated to insure a fully informed and well considered agency decision.

### D. The Forest Service and Corps of Engineers Have Failed to Satisfy NEPA's Requirements

The federal petitioners concede that a federal agency must consider mitigation measures in assessing the environmental consequences of a proposed action. *E.g.*, Fed. Pet. *Robertson* Br. 25. They also acknowledge that an EIS must contain sufficient data to permit a well reasoned agency decision. *Id.* But they urge the Court to adopt a standard for discussion of mitigation which is so lenient that it would grant to agencies the ability to act now and analyze the environmental consequences later—precisely the approach which NEPA has rendered unacceptable.

Moreover, the federal government's heated attacks on the court of appeals veil its blatant attempt to curtail agency obligations under NEPA. In neither *Methow Valley* nor *Marsh* did the court of appeals intrude into the realm of agency decisionmaking and order the Forest Service or the Corps of Engineers to undertake mitigation actions. Each holding reviews solely the quality of information agencies must provide to satisfy NEPA's mandate. On this question, the court of appeals properly followed the prior directives of this Court.[7]

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are removed from the initial decision sufficient data from which to draw their own conclusions about air, noise and water pollution." *Id.* at 782.

[7] Petitioners have seized on the court of appeals' dicta in *Methow Valley* and in *Marsh* to portray the decisions as significantly enlarging the responsibilities of federal agencies under NEPA. These decisions actually implement traditional NEPA procedural requirements, and are not founded on any substantive duty to mitigate environmental harm.

In *Marsh*, the court of appeals ruled that the "mere listing" of mitigation measures is insufficient to satisfy the regulatory requirement that an EIS discuss mitigation measures. 832 F.2d at 1493. As authority for these requirements, the court relied on an earlier Ninth Circuit precedent, *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 697 (9th Cir. 1986), *rev'd on other grounds*, 108 S.Ct. 1319; ____ U.S. ____ (1988). *Peterson* found that the discussion of mitigation measures proposed for timber harvesting in Six Rivers National Forest was insufficiently detailed "to qualify as the reasoned discussion



### 1. The Listing of Mitigation "Opportunities" in an EIS is Inconsistent with CEQ's Regulations and This Court's "Hard Look" Doctrine

Federal petitioners declare that federal agencies need only discuss mitigation "opportunities" in an EIS. This unsupported position is nothing more than a rewrite of CEQ's regulations, which elsewhere the federal government describe as "carefully crafted", Fed. Pet. *Marsh* Br. 23, and entitled to substantial deference, *id.* at 33. The regulations require that mitigation *measures* be discussed, 40 C.F.R. §§ 1502.14(f); 1502.16(h) (1987), and with good reason. "Opportunities" for mitigating a project may be legion, especially if they involve outside parties, such as state and local governments, absorbing the costs. The identification of such opportunities does little to insure that decisions which have irreversible consequences are undertaken with full knowledge of their impact on the environment, as NEPA mandates. *See* S. Rep. No. 296, *supra*, at 9 ("One of the major factors contributing to environmental abuse and deterioration is

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required by NEPA." *Id.* (quoting *Adler v. Lewis*, 675 F.2d 1085, 1096 (9th Cir. 1982).) *Peterson* thus turned solely on the agency's failure to fulfill its prodedural mandate under the statute.

As a further rationale for its ruling, the court of appeals in *Marsh* explained that without sufficient details about the mitigation plan, "the decisionmaker is unable to make an informed judgment as to the environmental impact of the project—one of the main purposes of an environmental impact statement." *Marsh*, at 1493-94 (citation omitted).

The court did not base its holding on any substantive duty to avoid harm under NEPA and did not require that any particular mitigation measures be adopted for the project (or that mitigation be adopted at all). The court discussed the standards for an adequate discussion in an EIS, which is the traditional role for courts under NEPA.

*Methow Valley* essentially elaborates on the well-established procedural requirements which the court described in *Marsh*. State amici agree that the court's initial dicta that NEPA requires that "actions be taken to mitigate the adverse impacts of federal actions," 833 F.2d at 819, is not supported by the case law. However, as in *Marsh*, the court's actual holding reviews only the level of detail required in an EIS, and does not require any affirmative steps by federal decisionmakers.

that actions—often actions having irreversible consequences—are undertaken without adequate consideration of, or knowledge about, their impact on the environment.").

The federal agencies additionally propose that so long as an EIS catalogs mitigation techniques, even if these are "general" and "conceptual in nature", an agency will have satisfied its "hard look" obligations. Fed. Pet. *Robertson* Br. 17, 31. The agency is under no duty to amplify what the mitigation measures will consist of or evaluate them for effectiveness prior to a decision being made. This is patently inconsistent with NEPA's requirements.

Simply listing mitigation measures in an EIS is meaningless to decisionmakers and the public. The fact that mitigation measures are theoretically possible discloses nothing about their monetary (or other) costs; the time involved in their implementation; the degree to which they have been used or been successful in the past; or the likelihood that they will actually work as proposed and reduce or compensate for a project's adverse impacts.[8] Worse, readers of an EIS are likely to interpret the listing of possible mitigation measures as indicating that there are realistic options for minimizing environmental damage.

Discussion of mitigation measures is mandatory under the CEQ regulations. Mitigation is a critical, indeed sometimes the

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[8] Amici's concern about mitigation measures that fail to fulfill their stated objectives is far from theoretical. For instance, many mitigation measures for wetland fill projects are unsuccessful. *See, e.g.*, Quammen, *Measuring the Success of Wetlands Mitigation*, 1986 Proceedings of the National Wetland Symposium: Mitigation of Impacts and Losses 242, 243 [hereinafter National Wetlands Symposium]; Walker, *A Review of Past Mitigation Projects in Florida*, National Wetlands Symposium 256, 257; Reimold & Thompson, *Wetland Mitigation Effectiveness*, National Wetland Symposium 259, 260. This is true for a variety of projects affecting natural resources. *See* Blumm and Kloos, "Small Scale Hydropower And Andromous Fish: Lessons And Questions From The Winchester Dam Controversy", 16 *Envtl. L.* 583, 615-617 (1986) (describing failure of mitigation measures for small-scale hydropower project to protect against damage to salmon and steelhead populations).



only, way that harm from a project can be avoided. Moreover, decisionmakers may rely on mitigation to justify a decision that a project's environmental costs are acceptable,[9] or to attempt to dodge a more complete evaluation of adverse environmental impacts.[10] In short, mitigation is an integral element in determining whether, and to what extent, a project will significantly damage the environment. Thus, to ensure that decisionmakers are fully apprised of the true environmental losses from proposed activities, and that an EIS provide "full and fair discussion" of all significant impacts, 40 C.F.R. § 1502.1 (1987), mitigation measures must be spelled out in detail and evaluated in an EIS.[11]

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[9] In *Methow Valley* for instance, the agency's Record of Decision provides that the project's severe effects on mule deer (*Early Winters EIS* 76), would be mitigated. (*See* ROD 3a: "No major adverse effects will result directly from the Federal Action."). The Early Winters EIS provided no basis for making this statement or for the Forest Service's reliance upon it in the decisionmaking process.

[10] *See National Wildlife Federation v. U.S. Forest Service*, 592 F.Supp. 931, 943 (D.Or. 1984) (Forest Service improperly relied on prior mitigation technique, which was only partially successful, to avoid more complete discussion of damage to fish habitat likely to result from timber harvesting).

[11] NEPA's requirement that agencies discuss mitigation measures in an EIS has not been extensively discussed in prior case law. Notably, however, there is no authority in the other circuit courts of appeal which supports the federal agencies' argument that a mere listing of mitigation "opportunities" is sufficient to comply with the statute. The cases dealing with mitigation reveal (1) a judicial recognition of the importance of mitigation measures, and (2) an assumption that there must be an analysis of mitigation measures before a project goes forward. *See Environmental Defense Fund v. Froehlke*, 473 F.2d 346, 351 (8th Cir. 1972) ("The proposed mitigation plans go to the very heart of the question before the Corps in preparing its environmental impact statement—whether the project should proceed at the present time in view of its environmental consequences".); *Duck River Pres. Ass'n v. TVA*, 410 F.Supp. 758, 766 (E.D. Tenn. 1974), *aff'd mem.* 529 F.2d 524 (6th Cir. 1976); *Simmans v. Grant*, 370 F.Supp. 5, 20 (S.D.Tex. 1974).

Other cases upholding impact statements have nonetheless recognized that there must be an adequate discussion of mitigation measures in an

The manner in which agency ignorance about mitigation measures frustrates fully informed decisionmaking is vividly illustrated in the two cases before the Court. In approving the Elk Creek dam, the Corps treated mitigation as an afterthought. The agency's entire discussion of mitigation for the loss of wildlife habitat caused by the proposed dam is contained in a single paragraph. *See Elk Creek SEIS* 6.

A number of commenters—including state and federal agencies, members of the timber industry, and the general public—complained that they could not evaluate the environmental costs of the project without knowing details about the mitigation plan, particularly how much land it would involve and what the ultimate impacts on wildlife would be.[12] The U.S. Fish and Wildlife Service (FWS), for instance, noted:

> "The 'compensation plan' for wildlife will be developed in 'cooperation with the Oregon Department of Fish and Wildlife Service.' We believe compensation is of such great importance as a measure toward mitigating wildlife habitat losses, it should be shown as a firm plan. *Otherwise no one can tell if it really would compensate.*" *Elk Creek SEIS* 104 (emphasis added).

The Southern Oregon Timber Industries Association similarly explained:

> "The project will eliminate valuable winter range for deer. However, there is no assessment of the impact of the mitigation measures. Some agricultural and timber land will undoubtedly be involved in the mitigation efforts. Both timber and agricultural values will be lost in the trade off. These costs need to be determined and entered in the cost benefit analysis." *Id.* at 95.

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EIS. *See, e.g., Trout Unlimited v. Morton*, 509 F.2d 1276, 1284 (9th Cir. 1974); *Davison v. Dep't of Defense*, 560 F.Supp. 1019 (S.D.Ohio 1982).

[12] *See, e.g., Elk Creek SEIS* 69 (comments of Oregon Department of Fish and Wildlife: "It isn't known yet if there is enough suitable land within the project to provide adequate compensation."); *id.* at 57 ("How can the mitigation cost be figured in when the plan has not been completed?"); *see also id.* at 85-86, 142.



Ironically, the Corps itself recognized that without a developed mitigation plan it could not accurately assess the environmental impacts or monetary costs of the Elk Creek Lake dam. In response to a letter from Congressman Jim Weaver, the Corps stated "[s]ince an approved mitigation plan for wildlife has not been completed, an accurate delineation of wildlife impacts cannot be portrayed." *Id.* at 132. Elsewhere the Corps noted that "upon authorization of further studies", a wildlife mitigation plan would be developed, and "[a]t that time, the relative benefits and impacts of alternative measures considered would have to be weighed." *Id.* at 86. The Corps further acknowledged in the SEIS that "[a]n accurate determination of mitigation costs cannot be calculated without the development of [a mitigation] plan." *Id.* at 58.

Similarly, the Early Winters EIS relies on a variety of actions by state and local governments, including zoning ordinances, development restrictions, tax incentives, and air quality regulations, to mitigate the project's off-site impacts on air quality and wildlife. Fed. Pet. *Robertson* Br. 32-35. Yet all of these measures are listed only as "opportunities" in the document. As the court of appeals correctly noted, there is no guarantee in the EIS or the Record of Decision that these measures would ever be implemented or even adopted. *Methow Valley*, 833 F.2d at 819-820.[13] Moreover, there is no evaluation of their likely effectiveness or the costs to local governments of implementing and enforcing these measures, and thus no way for local residents (among others) to judge the ultimate monetary and environmental burdens they will bear due to the project.

CEQ's regulations mandate that an EIS "shall provide full and fair discussion of environmental impacts". 40 C.F.R. § 1502.1 (1987). The regulations demand accurate information, of "high quality," *id.* at § 1500.1(b), that can assist decisionmakers in making a reasoned decision. Both the Corps' five sentence "discussion" of mitigation proposals in the Elk Creek SEIS and the

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[13] The Memorandum of Understanding (MOU) among the Forest Service and state and county governments outlining possible mitigation measures, upon which the Forest Service heavily relies, allows any party to withdraw from the agreement on thirty days notice. *MOU* 2, ¶ 9.

Forest Service's complete reliance on mitigation "opportunities", without any supporting analysis in the Early Winters EIS, fall drastically short of these directives.

### 2. Postponing Analysis of Mitigation Measures Until After a Project Has Been Approved Violates NEPA

The federal government also suggests that agencies must be afforded broad discretion in identifying the scope and timing of mitigation measures.[14] Basically, this is an ill-disguised effort to defer study of mitigation until after a project is underway, which directly conflicts with the basic premise of NEPA—that decisionmakers act with full knowledge of the environmental consequences of federal activities. *See Vermont Yankee*, 435 U.S. at 558; 40 C.F.R. § 1500.1(b) (1987) ("NEPA procedures must insure that environmental information is available to public officials before decisions are made and before actions are taken."); *id.* at § 1502.2(g) ("Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.").[15]

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[14] *See, e.g.*, Fed. Pet. *Marsh* Brief 19: "The government has broad discretion to determine the form and scope of the mitigation discussion in light of the particular circumstances."

[15] Contrary to petitioners' suggestions (Fed. Pet. *Marsh* Br. 24-25), the case law does not establish that an agency may defer meaningful discussion of mitigation pending future planning or the development of additional information. One line of cases petitioners cite, *Concerned Citizens on I-190 v. Secretary of Transportation*, 641 F.2d 1 (1st Cir. 1981), *Township of Springfield v. Lewis*, 702 F.2d 426 (3d Cir. 1983), and *National Indian Youth Council v. Watt*, 664 F.2d 220 (10th Cir. 1981) turns on what changes trigger the need for a subsequent EIS. Certainly agencies may add new mitigation measures or improve those proposed as a project develops, but this must be in addition to, not a substitute for, detailed mitigation measures at the time the project is approved.

The other line of authority petitioners cite, *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368 (2d Cir. 1977) *cert. denied*, 434 U.S. 1064 (1978), and *Village of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984), is inapposite to the cases before the Court. These decisions allow agencies to discuss mitigation measures in a general fashion at the



In both cases before this Court, the federal agencies contend that they should be allowed to rely on post-hoc preparation of mitigation measures. Fed. Pet. *Marsh* Br. 24; *Robertson* Br. 31-32. Of course, it was the unwillingness of Congress to accept assurances that agencies with competing programmatic missions would develop such measures which prompted the need for NEPA in the first place:

> "All agencies which undertake activities relating to environmental values, particularly those values relating to amenities and aesthetic considerations, are authorized and directed to make efforts to develop methods and procedures to incorporate those values in official planning and decisionmaking. In the past, environmental factors have frequently been ignored and omitted from consideration in the early stages of planning because of the difficulty of evaluating them in comparison with economic and technical factors." S. Rep. No. 296, *supra*, at 20.

In *Marsh*, the Elk Creek dam was ratified by the Corps even though the SEIS explicitly stated that measures to compensate for the project's impacts on wildlife habitat were to be developed in the future, based on an as-yet unfinished study. *Elk Creek Lake SEIS* 6. Yet the Corps' approval is unambiguously the final decision point allowing construction of the dam to proceed.

In *Robertson* the Forest Service acknowledges that the Early Winters EIS failed to disclose any specific measures to mitigate the adverse air quality and wildlife impacts stemming from the project. *See* Fed. Pet. *Robertson* Br. 31-32. The federal agencies argue, however, that a general discussion of potential mitigation "opportunities" is appropriate because the Forest Service's action will be followed by later review of the project. *Id.* at 31-35. This is a highly misleading characterization of the Forest Service's review process.

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programmatic stage of environmental review, while requiring specific discussion of mitigation measures at the final "go/no-go" stage of NEPA review. In both *Methow Valley* and *Marsh*, however, the EISs challenged are the final NEPA review for the projects proposed by the agencies. *See* discussion *infra*.

The Forest Service's issuance of the special use permit is the transfer of the right to occupy and use National Forest System lands or facilities for the specified purposes. 36 C.F.R. § 251.55 (1988). This approval is the agency's *final* land use allocation decision, Fed. Pet. *Robertson* Br. 4 n.4, and therefore the point at which the irretrievable commitment of resources occurs. The Early Winters EIS is the final NEPA review of the Forest Service's land use decision.

For this reason, NEPA's "tiering" regulations, and the accompanying NEPA case law, are inapposite. "Tiering" contemplates a program of staged development from a general policy proposal to a site specific proposal, *see Kleppe*, 427 U.S. at 410-411; *see also* 40 C.F.R. § 1508.28, in which each stage of the federal action will trigger formal NEPA review. *Village of False Pass v. Clark*, 733 F.2d at 609; *see also Secretary of the Interior v. California*, 464 U.S. 312, 338 (1984). With "tiered" projects, the programmatic EIS precedes any irretrievable commitment of natural resources; here, by contrast, the allocation of resources occurs before any subsequent review by the Forest Service.[16]

The Forest Service's failure to discuss or evaluate specific mitigation proposals is particularly insupportable since special use permits approved by the agency must include mitigation measures to protect the affected environment. 36 C.F.R. §§ 251.54, 251.56 (1988). By the Forest Service's own regulations, therefore, mitigation is part of the project under review. No one would seriously argue that a partial project description, subject to later addition,

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[16] Whatever post-hoc review may be undertaken for the project's on-site impacts, there will be no further review whatsoever for the project's off-site effects, which the Forest Service acknowledges are the most severe (Fed. Pet. *Robertson* Br. 8-9) and which state and local governments are expected to mitigate. The federal agencies suggest that because mitigation for off-site impacts is beyond the Forest Service's control, the agency's obligation to fully disclose and evaluate off-site mitigation measures is somehow diminished. Fed. Pet. *Robertson* Br. 32-34. The CEQ regulations, however, provide no distinction in the level of detail governing an agency's discussion of off-site as opposed to on-site effects. *See* 40 C.F.R. § 1502.16 (1987).



complies with NEPA, but that is exactly the proposition being urged on this Court by the federal agencies.

In both the Elk Creek and Early Winters projects, the agencies gave no more than a cursory glance to mitigation for the project's adverse impacts. By attempting to excuse themselves from any analysis of mitigation measures, the federal agencies are arguing that it is proper for decisionmakers to proceed in ignorance of whether significant adverse impacts can or will be reduced if a project goes forward. This position is contrary to the fundamental premise of NEPA, and should be rejected by the Court.

## II

## THE ARMY CORPS VIOLATED THE RULE OF REASON IN FAILING TO CONSIDER SIGNIFICANT NEW INFORMATION CONCERNING THE ELK CREEK DAM

In defending the Army Corps' refusal to prepare a supplemental environmental impact statement (SEIS),[17] the federal petitioners attempt to undermine the principles of NEPA in two fundamental ways: first, the federal petitioners argue that agency compliance with NEPA's procedural requirements is subject to judicial review under the discretionary "arbitrary and capricious" standard rather than the traditional NEPA standard of the "rule of reason" endorsed and adopted by the CEQ[18]; second, the

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[17] The CEQ's regulations implementing NEPA's procedural mandate require a federal agency to prepare a supplemental environmental impact statement whenever "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its consequences." 40 C.F.R. § 1502.9(c)(1)(ii)(1987).

[18] The rule of reason requires agencies to comply with NEPA's procedural requirements to the extent necessary to fulfill NEPA's mandate for full environmental disclosure. *Fritiofson v. Alexander*, 772 F.2d 1225, 1238 (5th Cir. 1985). In the context of an agency's decision not to prepare a supplemental EIS, the courts have stated that, "[r]easonableness depends on such factors as the environmental significance of the new information, the probable accuracy of the information, the degree of care with which the agency considered the information and

federal petitioners assert that the Corps satisfied NEPA's procedures by considering new information in a document prepared not merely *after* the final decision to proceed had been made, but *after* the initiation of this litigation. This Court should reject these extraordinary attempts by the federal agencies to undermine NEPA's procedural mandate as interpreted by the CEQ.

### A. NEPA Commands Agencies to Act Reasonably in Their Application of NEPA's Procedural Requirements

The CEQ has expressly adopted the "view that adequacy of the content of the EIS should be determined through a use of a rule of reason." 51 Fed. Reg. 15621 (1986), *citing, Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974).[19] Yet federal petitioners promote the view of three errant courts of appeal that still apply the "arbitrary and capricious" standard of review to compliance with NEPA regulations.[20] Such an assertion is a

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evaluated its impact, and the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data." *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1021-1024 (9th Cir. 1980).

[19] The CEQ has recently reiterated its adoption of the "rule of reason" in its revised regulations governing agency disclosure and examination of uncertainty. 51 Fed. Reg. 15618 (1986). The "rule of reason" was codified in CEQ's binding regulations implementing NEPA's procedural mandate. 43 Fed. Reg. 55978, 55983 (1978). The "rule of reason" is most often articulated as holding agencies to "reasoned" decisionmaking and requiring that a "reasonable" range of alternatives be examined. *See* 40 C.F.R. §§ 1500.6, 1502.14 (1987).

[20] The majority of circuit courts of appeals apply the "reasonableness" standard of review to agency compliance with NEPA's procedural requirements. The seminal case discussing NEPA's procedural mandate is *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109 (D.C.Cir. 1971). Following the lead of the CEQ and early NEPA common law are the following circuit courts of appeal: *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 465-466 (5th Cir. 1973); *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1319-20 (8th Cir. 1974); *Township of Lower Alloways Creek v. Public Service Electric and Gas Co.*, 687 F.2d 732, 740-742 (3d Cir. 1982); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir. 1980);



direct contradiction of CEQ's adoption of the "rule of reason" and is not in keeping with NEPA's command for compliance "to the fullest extent possible."[21]

Section 101 of NEPA "announced a national policy of environmental protection and placed a responsibility upon the Federal Government to further specific environmental goals. . . . " *Kleppe v. Sierra Club*, 427 U.S. at 409. Section 102, which spells out the statute's procedural requirements is, in the words of this Court, the "*action-forcing*" provision of the statute "intended as a directive to 'all agencies to assure consideration of the environmental impact of their actions in decision-making'." *Id.* (citations omitted) (emphasis added).

NEPA's mandatory language and admonition to comply with section 102's procedural requirements "to the fullest extent possible" have dictated a more searching standard of judicial review for agency compliance with NEPA's procedural requirements than for agency policy decisions. Although agencies may retain a broader discretion when they make substantive policy decisions, they must meet NEPA's command for strict procedural compliance in the execution of their NEPA duties under section 102.[22]

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*Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973); *National Wildlife Federation v. Marsh*, 721 F.2d 767, 782 (11th Cir. 1983). *See also* Justice White's dissents to the Court's denials of certiorari in *Gee v. Boyd*, 471 U.S. 1058 (1985) and *River Road Alliance v. Army Corps of Engineers*, 475 U.S. 1055 (1986). *But see, Town of Orangetown v. Gorsuch*, 718 F.2d 29 (2d Cir. 1983) *cert. denied*, 465 U.S. 1099 (1984); *Providence Road Community Assoc. v. Environmental Protection Agency*, 683 F.2d 80 (4th Cir. 1982); *River Road Alliance, Inc. v. Corps of Engineers*, 764 F.2d 445 (7th Cir. 1985), *cert. den.*, 475 U.S. 1055 (1986).

[21] *See also* Exec. Or. 11991(2), 3 CFR 123 (1978).

[22] This Court has left little doubt that agencies' substantive decisions, whether to proceed or not to proceed with a proposed action, are discretionary decisions reviewed for arbitrariness under section 706 of the APA. *Vermont Yankee*, 435 U.S. at 558; *Baltimore Gas and Electric*, 462 U.S. at 98. Petitioners argue that this Court's decisions in *Vermont Yankee* and *Baltimore Gas & Electric* have decided the standard of review for federal agency compliance with section 102 and

In fulfillment of NEPA's mandate, the CEQ has directed the application of the "rule of reason" to agency compliance with its procedural implementation of NEPA. 50 Fed. Reg. 32236 (1985); 51 Fed. Reg. 15621 (1986). The CEQ has endorsed the "rule of reason" as traditionally articulated by the courts.[23] The CEQ has informed agencies that "[i]mplicit in this rule of reason is the overriding statutory duty of compliance with impact statement procedures 'to the fullest extent possible'." 50 Fed. Reg. 32237 (1985) *citing, Scientists' Institute for Public Information v. AEC*, 481 F.2d at 1092. The mandatory nature of NEPA's command for procedural compliance dictates that federal agencies' implementation of NEPA procedure be "reasonable".

Under NEPA, the courts are called upon to review agency action on two levels; first, for compliance with NEPA procedure as directed by the CEQ and NEPA itself; and second, for the agency's substantive decisions, or policy making decisions, to proceed or not to proceed with proposed actions.[24] The CEQ has

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CEQ's procedural regulations. Fed. Pet. *Marsh* Br. 37. Petitioners err because *Vermont Yankee* and *Baltimore Gas & Electric* both arose from the Atomic Energy Commission's rule-making process and did not involve any questions concerning NEPA's mandate to comply with its procedural requirements to the "fullest extent possible." Congress has set the standard for agency compliance with section 102 of NEPA at "the fullest extent possible." This standard does not allow broad agency discretion in compliance with NEPA procedures, rather it commands "reasonableness" at a minimum. *Calvert Cliffs' Coordinating Committee*, 449 F.2d at 1112-1115.

[23] The CEQ has specifically endorsed the rationale and holdings of the following cases: *Environmental Defense Fund v. Corps of Engineers*, 492 F.2d 1123 (5th Cir. 1974); *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971); *Scientists' Institute for Public Information v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973); *Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983). 50 Fed. Reg. 32237 (1985). The CEQ's regulations embody "[a] combination of agency practice, judicial decisions and CEQ guidance." 50 Fed. Reg. 32235 (1985).

[24] Federal petitioners attempt to blur the distinction between agency compliance with NEPA's procedural mandate to create an environmental full disclosure document and the agency's discretion to determine agency actions after complete environmental review. Fed. Pet. *Marsh* Br. 38. In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), this Court held that the decision of the NHTSB to proceed with the portion of the highway going through a park was to be held to an "arbitrary and capricious" standard of review. In *Overton Park* the agency's decision was a substantive one, based upon the record already developed by the agency. The agency's record was reviewed by the Court to determine whether it reflected the agency's "hard look" at the requirements of two federal statutes. The arbitrary and capricious standard was not applied to the agency's threshold decision whether or not to comply with the statutes in the first instance, which the Court said was subject to a "thorough, probing, in-depth review." 402 U.S. at 415. Neither should that standard be applied to agencies' threshold decisions to comply with NEPA's procedural obligations to prepare an EIS, supplement an EIS, or otherwise comply with the CEQ's regulations.



recognized the distinction between procedural implementation of the NEPA mandate and the use of the NEPA process in agency decisionmaking. 43 Fed.Reg. 55985-86 (1978) (explaining the role of the agency's record of decision as the "link" between NEPA's procedural requirements and agency policy decisions). Agencies are entitled to deference in their policymaking roles, but not when they are commanded by Congress to follow NEPA's regulatory procedures.

Contrary to the assertions of federal petitioners, compliance with NEPA procedure is not an area requiring the application of an agency's scientific expertise.[25] When agencies are applying

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[25] To support this assertion, federal petitioners refer to a single statement in *Kleppe v. Sierra Club*, 427 U.S. 412. Fed. Pet. *Marsh* Br. 36. The Court's statement does not refer to agency implementation of NEPA procedures and was made without the benefit of CEQ's interpretive regulations. The agency is not interpreting its own enabling statute or regulations when it undertakes its procedural duties under NEPA. Therefore, the deference due an agency interpreting its own regulations is not applicable here. Congress has mandated that all federal agencies comply "to the fullest extent possible" with NEPA's procedural mandate, the CEQ has adopted interpretive regulations binding on all federal agencies, and the CEQ has chosen the traditional standard of "rule of reason." The statute and the CEQ regulations constitute additional law to be applied to all agencies in fulfilling their NEPA obligations.

NEPA's regulatory procedures to their proposed activities they are applying law, not policy, to facts generated by agency expertise. Congress has commanded that agencies perform this law applying function "to the fullest extent possible"—a statutorily mandated standard stricter than that imposed by the APA.

An agency's determination of what information is "significant" is an application of NEPA law and the CEQ regulations to the facts before it. The term "significant" is defined by the CEQ's regulations, and the agency is required to apply that definition and NEPA law to the facts before it. *See* 40 C.F.R. § 1508.27 (1987). The application of NEPA's procedural mandate to a factual record is not an agency policymaking act; it is a judgmental process that must give life to the purposes of NEPA and the letter of the CEQ regulations "to the fullest extent possible." NEPA itself commands a higher standard of review to enforce its mandate for more reasoned decisionmaking. This Court should affirm CEQ's adoption of the "rule of reason" and ensure that federal agencies act "reasonably" in following NEPA's procedural regulations.

### B. The Army Corps Acted Unreasonably in Failing to Consider New Information Before Its Final Decision to Build Elk Creek Dam

The original EIS for the Elk Creek dam was prepared by the Army Corps in 1971. The project was postponed for ten years as a result of the water quality and fishery impact problems. In 1980, the project was resurrected and a supplemental EIS prepared on the new information on impacts to wildlife and water quality. Five years later, new information regarding the dam's potential impacts on water quality, salmon and steelhead survival was developed by the Oregon Department of Fish and Wildlife as a result of studies conducted on the Corps' Lost Creek dam. Fed. Pet. *Marsh* Br. 3a. The final ODFW report projected a 30 to 45 percent decrease in salmon fry survival rate upon the closure of the Elk Creek dam and projected impacts on the Rogue River fishery at the closure of Elk Creek dam that could be significant. Fed. Pet. *Marsh* Br. 9a.



However, the Corps did not consider either the draft or final ODFW reports before making its final decision to proceed with dam construction without preparing a supplemental EIS. *Marsh*, at 1494. The only record of the agency's consideration of the Oregon Department of Fish and Wildlife's information is the Corps' SIR. Fed. Pet. *Marsh* Br. 39-40. The Corps prepared the SIR *after* its decision to proceed with the dam construction was challenged in court. Not only does the SIR fail to provide consideration of new information prior to the final decision to proceed with the project, the SIR can only be viewed as a post hoc rationalization of the decision already made by the agency.[26] The Corps' actions belie any attempt to comply with the CEQ regulations.

In addition, in 1982 the U.S. Soil Conservation Service had prepared a study on the soil in the Elk Creek area and found its type and texture was different from that *assumed* by the 1980 Elk Creek SEIS. *Marsh*, at 1496. The new soil classification indicated that the soil in the Elk Creek watershed would contribute to turbidity to a much greater extent than previously assumed by the Corps' 1980 Elk Creek SEIS. The Corps, however, did not review the SCS turbidity study in deciding whether there was significant new information warranting a supplement to the 1980 SEIS. *SIR*, Fed. Pet. *Marsh* Br. 3a. In its post hoc rationalization developed for this Court, the agency continues to rely exclusively on its model based on the Lost Creek soil types and its proposed mitigation measures.[27]

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[26] Administrative findings prepared after the time of the decision are to be viewed critically. *Citizens to Preserve Overton Park*, 401 U.S. at 419-421. The Army Corps' SIR was prepared not merely *after* its decision to proceed, but three months after the initiation of this litigation and days before the preliminary injunction hearing in this case. The SIR so heavily relied upon by the Corps to justify its failure to prepare a supplemental EIS is little more than a litigation affidavit and should be viewed, at best, with suspicion.

[27] Petitioners' brief admits that the Corps' decision not to supplement the SEIS was based partially on "management" techniques to reduce turbidity. Fed. Pet. *Marsh* Br. 43. Despite the fact that the effectiveness of these measures had never been analyzed, the Corps relied on these

As the *Marsh* case illustrates, compliance with NEPA's procedural requirements cannot be left to agency discretion without minimizing the Congressional goals of better and more informed environmental decisionmaking. Reviewing courts must be allowed to determine whether the agency's rejection of new information was "reasonable"; to do otherwise risks allowing federal agencies to shape the NEPA process to conform to their own convenience and hamper the ability of states and the public to effectively participate in the federal environmental planning process. This Court should affirm the application of the "rule of reason" to agency compliance with NEPA's procedural requirements and reject the Army Corps' reliance on post hoc rationalizations.

## III

## NEPA AND CEQ REQUIRE A DETAILED ANALYSIS OF THE COSTS AND CONSEQUENCES OF PROCEEDING IN THE FACE OF UNCERTAINTY

NEPA's most fundamental premise requires that federal agencies evaluate the future consequences of today's decisions, including those future consequences that cannot be known for certain. While NEPA does not hinder an agency's ability to proceed in the face of uncertainty, it does require federal agencies to disclose the risks and potential consequences of doing so. 40 C.F.R. § 1502.22 (1987); *see also* 50 Fed.Reg. 32234-38 (1985) and 51 Fed.Reg. 15618-26 (1986).

In these two cases, the federal agencies make much of the court of appeals' reliance on CEQ's "worst case analysis" regulations. For the amici states, however, the crucial point is not the label attached to the process for addressing uncertain future impacts, rather amici urge this Court to affirm CEQ's determination that federal agencies bear a continuing obligation to disclose the risks and potential consequences of proceeding in the face of uncertainty.

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techniques to proceed with the project, as well as a reason not to gather and disclose new information. In so doing, the Corps has improperly used the mere possibility of mitigation measures to cloak the environmental consequences of the Elk Creek project. *See* discussion *supra*.



In 1980, the CEQ developed the "worst case analysis" as the procedure for agencies to take a "hard look" at uncertainty and thus comply with NEPA's command that agencies examine the potential consequences of proceeding in the face of uncertainty. 40 C.F.R. § 1502.22 (1980); 43 Fed.Reg. 55984, 55997 (1979). In 1986, the CEQ revised its "uncertainty" regulation by supplanting the "worst case analysis" procedure with a "summary of existing credible scientific evidence which is relevant to evaluating reasonably foreseeable significant adverse impacts on the human environment" and evaluation of "the impacts based upon research methods generally accepted in the scientific community." 40 C.F.R. §§ 1502.22(b)(3),(4)(1987). In both the "worst case" regulation and in the new "uncertainty" regulation, CEQ has done nothing more than codify existing NEPA law which requires that federal agencies disclose and analyze the costs of uncertainty.

The states appearing as amici herein, urge this Court to recognize and affirm CEQ's codification of this NEPA "common law" governing agency obligations to take a "hard look" at the risks of proceeding in the face of uncertainty. In its restructuring of the uncertainty regulation, CEQ specifically relied upon and adopted the basic principles of NEPA as enunciated by the courts. Thus, CEQ confirmed that "one of the costs that must be weighed by decisionmakers is the cost of uncertainty—i.e. the costs of proceeding without more and better information." 51 Fed.Reg. 15624 (1986), *citing, State of Alaska v. Andrus*, 580 F.2d at 473.

In adopting the principles set forth in *Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1985), CEQ has said that agencies retain the duty to describe the consequences of a remote but potentially severe impact. 50 Fed. Reg. 32237 (1985). "The probable remoteness of an impact does not excuse an agency from an evaluation of those impacts when there is a body of data with which an evaluation can be made which is not unreasonably speculative." *Id., citing, Sigler* at 974.[28]

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[28] CEQ requires that agencies recognize that "one of the functions of a NEPA statement is to indicate the extent to which environmental

In both of the cases under review here, the court of appeals identified information gaps which might trigger CEQ's regulations for addressing uncertainty.[29] In the *Marsh* case, the Oregon Department of Fish and Wildlife found that uncertainty existed concerning the turbidity level of the water releases the Elk Creek would contribute to the total flow of the Rogue River. *Elk Creek SEIS*, Letter 6, from ODFW dated March 27, 1980, p. 2. In addition, the Elk Creek's contribution to the total flow of the Rogue River remained uncertain. *Id.* at p. 1. The ODFW concluded that these uncertainties could have significant effects on Rogue River salmon production and requested that further research be performed. *Id.* at p. 2. In light of this information, the court of appeals ordered the Corps either to perform the research necessary to resolve the data gaps or to prepare a "worst case analysis." *Marsh*, at 1497.[30]

Similarly, in *Methow Valley*, the order of the court of appeals required the Forest Service to provide information to fill identified data gaps. Only if the information was not available would the

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effects are essentially unknown." 50 Fed. Reg. 32236 (1985), *citing Scientists' Institute for Public Information*, 481 F.2d at 1092. Agencies must examine the risks and potential consequences of proceeding with an agency's proposal in the face of scientific uncertainty as part of their NEPA mandate. 50 Fed. Reg. 32237 (1986), *citing Calvert Cliffs' Coordinating Committee*, 449 F.2d at 1114.

[29] The plain language of CEQ's new uncertainty regulations shows that the old "worst case" process applied to both the Early Winters and Elk Creek EISs. CEQ specifically decided that the new regulation would apply only to those EISs in progress or initiated after May 27, 1986. 40 C.F.R. § 1502.22(c) (1987). The SEIS in the *Marsh* case was completed in 1980, and the EIS in *Methow Valley* was completed in 1984. Thus, at the time the respective federal agencies prepared these documents they knew that they were bound by the "worst case analysis" regulation.

[30] Regardless of the label placed on the analysis or research, the information to be provided by the Corps is essential to Oregon's ability to plan for the effects of the Elk Creek dam on its salmon fishery. The Army Corps must take a "hard look" at the potential, if uncertain, consequences of the Elk Creek dam on Oregon's salmon fishery.



Forest Service be required to perform a "worst case analysis." *Methow Valley*, at 817. In fact, CEQ's "worst case" requirement has not yet been triggered[31] because the Forest Service is in the process of performing the necessary research on the Methow mule deer herd to be included in a revised EIS that will meet the "hard look" requirements of NEPA. *Methow Valley*, at 817.[32]

Many federal actions involve uncertain consequences that must be disclosed to state and local planning agencies. Federal actions determine the transportation of hazardous materials through metropolitan areas, the discharges of pollutants into state waters and air, and the spraying of insecticides and herbicides on public lands. State and local agencies are the first to respond when unexpected consequences occur. State legislatures must have sufficient information to provide leadership on behalf of their citizens. The preparation of an EIS not only provides a structure for state participation in the federal environmental review process, but functions as a full disclosure requirement and planning tool for states that must be prepared to cope with the ultimate consequences of federal activities.

Regardless of the label attached to the process used to deal with uncertainty, under CEQ's regulations, federal agencies must disclose and analyze such uncertainty. It is imperative to the states that NEPA's and CEQ's requirements be strictly enforced and that federal agencies be required to take a "hard look" at the consequences of their actions *before* deciding to proceed.

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[31] Both of these cases present a basic ripeness problem because the court of appeals did not order that "worst case analyses" be prepared. Rather, the court only ordered that information gaps be filled, and only if the information was unavailable would the "worst case" requirement be triggered. Thus, even under the terms of the court of appeals' orders, "worst case analyses" may never be required.

[32] The information is important to the State of Washington which must plan for the potential consequences of losing a large percentage of the deer herd as a result of the construction of the major destination ski resort. The potential loss of state fish and game resources are of vital import to the states and must receive the "hard look" NEPA demands.

## CONCLUSION

For all of the foregoing reasons, the twenty-eight states appearing as amici curiae herein respectfully request that the decision of the Court of Appeals for the Ninth Circuit be affirmed.

DATED: November 14, 1988

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# AMICUS CURIAE

# BRIEF

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No. 87-1703

In The

# Supreme Court of the United States

October Term, 1988

F. DALE ROBERTSON,
CHIEF OF THE FOREST SERVICE, *et al.*,
*Petitioners,*

v.

METHOW VALLEY CITIZENS COUNCIL, *et al.*,
*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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## ISSUES PRESENTED

1. Whether the National Environmental Policy Act requires an environmental impact statement to include a discussion of means to mitigate the adverse impacts of a proposed action and of the likely effectiveness of such mitigation measures?

2. Whether Forest Service regulations require special use permits to include measures to mitigate the adverse environmental impacts of the permitted activity?

3. Whether the National Environmental Policy Act requires an environmental impact statement to include an analysis of the worst potential adverse impacts of a proposed action even where the actual occurrence of such impacts is subject to uncertainty?

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## STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amici Curiae are non-profit public interest membership organizations[2] whose purposes include monitoring the activities of federal agencies that may affect significantly the quality of the environment. For nearly two decades, the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, has enabled amici and their members to review the environmental effects of agency proposals in an informed and meaningful manner. The radical interpretation of NEPA that petitioners (hereinafter the "Forest Service") urge on this Court would severely limit the duty of agencies to disclose fully the environmental consequences of proposed actions and, accordingly, would impair substantially the ability of amici to monitor federal actions and their effects.

In addition, members of amici organizations use public lands under the jurisdiction of the Forest Service for a wide variety of recreational and aesthetic purposes. These members rely on the Forest Service to protect the environmental quality of the lands it manages. The interpretation of Forest Service regulations that the agency urges in this case would reduce sharply the level of environmental protection afforded these lands.

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[1] All parties have consented in writing to the participation of these amici pursuant to Rule 36, Revised Rules of the Supreme Court. This brief is filed in support of the position of Respondent, Methow Valley Citizens Council, et al. in No. 87-1703 and addresses the duties of the United States Forest Service under the National Environmental Policy Act and its own regulations.

[2] Appendix A to our companion amicus brief in *Marsh, et al. v. Oregon Natural Resources Council, et al.*, No. 87-1704 [hereinafter "Amicus Brief at —"], provides additional information regarding the individual amicus organizations.

## SUMMARY OF ARGUMENT

NEPA has two fundamental procedural aims: (1) to provide federal decisionmakers with a complete, thorough and detailed analysis of the potentially significant environmental consequences of a proposed action; and (2) to disclose to the public that these environmental factors have informed the decisionmaking process. *Baltimore Gas & Electric Co. v. Natural Resources Defense Council,* 462 U.S. 87, 97 (1978). Through these twin procedural aims, NEPA seeks to achieve its underlying substantive policy of protecting the natural environment from the adverse consequences of man's activities. 42 U.S.C. § 4331; *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519, 548 (1978).

In this case, as the Ninth Circuit Court of Appeals properly found, NEPA's basic procedural aims were not met. The Forest Service did not develop and then assess in the *Early Winters Study*[3] the effectiveness of measures proposed to mitigate the project's significant environmental impacts. The court of appeals also properly ruled that NEPA could require the Forest Service to disclose and discuss the worst potential impacts of the Early Winters project.

In addition, the appellate court correctly determined that the Forest Service failed to comply with its own regulations. These rules require development and evaluation of mitigation measures for projects authorized by

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[3] For convenience, amici will use the abbreviated titles of major documents in this case that the Forest Service adopts in its opening brief.



special use permit, as well as implementation of such measures.

This brief will address first the Forest Service's failure to analyze mitigation measures as required by NEPA and its own regulations and then address the Forest Service's duty to assess the worst case impacts of its project.

## ARGUMENT

### I. NEPA REQUIRES FEDERAL AGENCIES TO DEVELOP, ANALYZE AND DISCLOSE MEASURES TO MITIGATE THE ADVERSE IMPACTS OF A PROJECT

Amici adopt from their brief in *Marsh, et al. v. Oregon Natural Resources Council, et al.,* No. 87-1704, their argument that NEPA requires complete development and thorough analysis of measures to mitigate the adverse consequences of federal projects. *See* Amicus Brief at 5-17.

In this case the Forest Service, like the Corps in *Marsh,* asserts that it will give more attention to the development and analysis of mitigation measures at some future date. Brief for Petitioners at 31-38, *Robertson, et al. v. Methow Valley Citizens Council, et al.,* No. 87-1703 [hereinafter "Solicitor's Brief at —"]. The Forest Service intends this assurance to excuse the few scattered pages in the *Early Winters Study* identifying in outline form mitigation measures that could be adopted to ameliorate both on- and off-site impacts of the Early Winters project. *Early Win-*

*ters Study* at 68-69, 77-78.[4] Of course, there is no discussion of which of these measures will be implemented, on- or off-site, or their likely effectiveness. *Id.* Even if the listed mitigation measures will be addressed more thoroughly later, as explained in our brief in *Marsh*, NEPA does not countenance such deferred analysis. Amicus Brief at 14-17.

The practical dangers of a deferred analysis of mitigation measures are apparent in this case. First, the Forest Service decided to grant a special use permit for the Early Winters project without any information about the practicality, cost or effectiveness of the mitigation measures identified in the *Early Winters Study*. As in *Marsh*, this defect goes to the heart of NEPA's procedural mandate. A federal agency has made a decision to proceed with a project before it has identified, developed and disclosed through a reasoned discussion available to both the decisionmaker and the public all of the revelant environmental factors. *See* Amicus Brief at 10-17 (and cases cited therein).

Evasion of a timely and reasoned discussion of mitigation measures is of particular concern in this case because the very decision the Forest Service had to make—whether to issue a special use permit for the Early Winters project—involved not only analysis of environmental impacts, but also an assessment of the permittee's financial

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[4] The Forest Service's characterization of this list of mitigation measures as a "compendious discussion," Solicitor's Brief at 35, is either accidental or hyperbolic. *Cf. Flint Ridge Development Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787 (1976) ("NEPA's instruction[s] [to federal agencies are] neither accidental nor hyperbolic").



ability to comply with the permit terms. *See* 36 C.F.R. § 251.52. As explained in Section II below, the terms of the permit must include mitigation measures. Since the *Early Winters Study* merely identifies potential mitigation options in a generic list, without discussing costs or effectiveness, the agency is left to guess at both the permittee's financial ability to implement any mitigation measures that ultimately may be required, and the consequences of a financial failure to implement the required mitigation. The purpose of NEPA is to eliminate such speculation and guess-work. 42 U.S.C. § 4332; *Foundation for North American Wild Sheep v. Department of Agric.*, 681 F.2d 1172, 1179 (9th Cir. 1982); *Jette v. Bergland*, 579 F.2d 59, 63 (10th Cir. 1978).

Under these circumstances, the potential to shuffle aside environmental values and ultimately to reduce or delete implementation of mitigation measures is obvious. As this Court has recognized, the purpose of NEPA's precise procedural mandate is to avoid exactly such a deferral of attention to relevant environmental considerations. *See Flint Ridge Development Co.*, 426 U.S. at 787.

## II. THE FOREST SERVICE'S SPECIAL USE PERMIT REGULATIONS REQUIRE A MITIGATION PLAN PRIOR TO ISSUANCE OF A PERMIT

The Forest Service must develop, evaluate and ultimately require implementation of mitigation measures when it issues a Special Use Permit ("SUP"). *See* 36 C.F.R. § 251.54-.64. These requirements are apparent both

on the face of the SUP regulations and in the agency's internal guidelines and regulatory definitions.[5]

### A. The Plain Language Of The Forest Service's Special Use Permit Regulations Requires A Mitigation Plan Prior To Issuance Of A Permit.

The Forest Service SUP regulations require a mitigation plan. The applicant must include in its permit application an "environmental protection plan," which consists of "proposed measures and plans for the protection and rehabilitation of the environment" throughout the life of the project. 36 C.F.R. § 251.54(e)(4). The Forest Service also "may require any other information and data necessary to determine . . . impacts on the environment . . . and suitable terms and conditions to be included in the authorization." *Id.* § 251.54(e)(5). Thus the applicant's own description of the project must give the Forest Service "sufficient detail" to evaluate the project's environmental impacts and identify appropriate permit terms and conditions. *Id.* § 251.54(e)(3).

These terms and conditions must include a mitigation plan that is complete before the permit can issue. For example, the agency must identify to the applicant "potential constraints" on special use activities, "environmental and management considerations [and] special conditions." 36 C.F.R. § 251.54(a)(6),(7). Similarly, following receipt of the application, the regulations require the agency to "assess the applicant's qualifications; complete an environmental analysis, assessment and/or [EIS] . . .; and take any other action necessary to fully evaluate . . . the application and *to prescribe suitable terms and conditions.*" *Id.* § 251.54(f)(1) (emphasis added). A subsequent provision, section 251.56, defines the phrase "terms and conditions" by requiring every special use authorization to include:

> terms and conditions which will . . . minimize damage to scenic and aesthetic values and fish and wildlife habitat and otherwise [sic] protect the environment . . . and . . . such terms and conditions as the authorized officer deems necessary to . . . require siting to cause least damage to the environment . . . .

36 C.F.R. § 251.56(a). The "terms and conditions" which are referred to throughout section 251.54, and which must be included in a special use permit, therefore, must include appropriate mitigation measures for project impacts.[6]

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[5] The statute that authorizes the Early Winters project, 16 U.S.C. § 497 (1982), both authorizes and requires the Forest Service to address mitigation measures. The statute confers on the Secretary of Agriculture the authority to issue special use permits "under such regulations and upon such terms and conditions as he may deem proper." The act closes with the admonition that this authority "shall be exercised in such manner as not to preclude the general public from full enjoyment of the natural, scenic, recreational, and other aspects of the national forests."

[6] The regulatory history of the SUP rules confirms the requirement for a mitigation plan. The Forest Service proposed the rules now governing SUPs in 1979. *See* 44 Fed. Reg. 29107 (1979). Several comments on the proposed rules encouraged the agency to require right-of-way holders to pay for lost wildlife habitat. *See* 44 Fed. Reg. 29107, 29110 (1979). The Forest Service declined, explaining that it "prefer[red] to require *appropriate* mitigation measures," and that "mitigating measures are *carefully designed* to protect or restore wildlife habitat." *Id.* at 29111 (emphasis added). Thus, the agency envisioned mitigation conditions that it would tailor to the particular situation and whose utility and effectiveness it would have evaluated prior to inclusion in a permit.

Compliance with the SUP rules also requires the Forest Service to consider the effectiveness of mitigation plans. Without analysis of the effectiveness of mitigation plans, it is impossible to "require appropriate mitigation measures" that satisfy the regulatory requirements. 44 Fed. Reg. 29107, 29111 (1979). For example, without an-analyzing the effectiveness of mitigation measures, Forest Service personnel cannot determine that proposed permit terms and conditions "*will* minimize damage" to environmental values. 36 C.F.R. § 251.56(a) (emphasis added). Nor can the agency determine that they "will" protect the environment. *Id.* Merely listing hoped-for mitigation measures, as the Forest Service did in the *Early Winters Study*, would defeat the goal of the SUP regulations to "prepare a site-specific study including appropriate environmental analysis to determine . . . [r]equired mitigation measures." Forest Service Manual § 2341.21.

Instead of addressing these regulations, the Forest Service asserts that it "generally reviews [SUP] applications for major developments through a two-stage process." Solicitor's Brief at 46-47. In phase one, the agency merely looks at the "*general* environmental and financial feasibility" of the project. If it "determines that a *general* scheme for development is environmentally sound, it may issue a permit." Pet. for Cert. at 5 n.3 (emphasis added). Presumably the agency develops specific mitigation plans, if at all, during phase two, development and approval of a master plan.

The regulations do not provide for such staged analysis. On the contrary, section 251.54(f) requires the Forest Service to complete an environmental analysis and to



take "any other action necessary to *fully* evaluate and make a decision to approve or deny the application and to prescribe *suitable* terms and conditions" *before* issuing a permit. 36 C.F.R. § 251.54(f) (emphasis added.) Accordingly, the Ninth Circuit properly concluded that the Forest Service violated its own SUP regulations by deferring actual analysis of mitigation measures until after it issued the SUP for the Early Winters project.

### B. Forest Service Internal Regulations Reaffirm The Requirement For A Mitigation Plan.

The Forest Service's internal regulations reinforce the SUP regulations' requirement of a mitigation plan. Regional supplements to the Forest Service Manual ("FSM") require, for example, completion of an environmental protection plan as part of the application process, prior to issuance of a special use permit.[7] Similarly, the FSM directs that, "[*b*]*efore* authorizing recreation activities, uses, or development of new sites[,] . . . [the agency must prepare] a *site-specific* study including *appropriate* environmental analysis to determine . . . [r]equired mitigation measures." FSM 234.21 (emphasis added). This language leaves no doubt that the agency itself requires actual mitigation measures tailored to the particular situation before it issues each SUP.

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[7] *See, e.g.*, FSM 2712.4 (Region 2 Supp. June 1983). The relevant parent text of the Forest Service Manual has not been updated since the SUP regulations were amended in 1980.

### C. The Special Use Permit Rules Provide For A Review That Is Separate And Distinct From That Required By NEPA.

The Forest Service portrays the Ninth Circuit's interpretation of the SUP regulations as an unjustified extension of the court's erroneous reading of NEPA. Solicitor's Brief at 45. The Forest Service's special use permit requirements, however, are separate and distinct from the agency's obligations under NEPA.[8] First, the Forest Service SUP' regulations have no threshold for application of mitigation requirements, as does NEPA. There is no Forest Service SUP equivalent to the NEPA threshold of "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332. Accordingly, unlike NEPA, the SUP rules require mitigation for all proposed uses, regardless of the magnitude or impact of a particular project.

Second, the SUP regulations do not resemble the Forest Service's NEPA regulations. Thus, when the Forest Service proposed major revisions to the SUP rules in 1979, it did not even mention NEPA. *See* 44 Fed. Reg. at 29107-14. Because the SUP and NEPA rules have different triggers and histories, the requirement in the SUP regulations to address and implement mitigation measures is distinct from NEPA's requirement to disclose and discuss such measures.

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[8] As the agency noted in the preamble to its final rules: "Our intent is to make sure a Forest Service authorization is not considered by anyone to be a substitute for documents required by other laws." 45 Fed. Reg. 38324, 38325 (1980).



## III. NEPA REQUIRES FEDERAL AGENCIES TO DISCLOSE THE POTENTIAL WORST CASE IMPACTS OF A PROJECT

Amici adopt from their brief in *Marsh, et al. v. Oregon Natural Resources Council, et al.*, No. 87-1704, their argument that NEPA requires federal agencies to disclose and discuss the worst case impacts of a project. *See* Amicus Brief at 18-24.

In this case, as in *Marsh*, the Ninth Circuit noted that if the government could not obtain additional information about likely project impacts, it should conduct a "worst case analysis." *Methow Valley Citizens Council, et al. v. Robertson*, 833 F.2d 810, 817 (9th Cir. 1987). Unlike the Corps of Engineers in *Marsh*, however, the Forest Service does not challenge the Ninth Circuit's premise that there is sufficient uncertainty regarding the environmental impacts of the Early Winters project to require either additional study or a worst case analysis. Solicitor's Brief at 42-45. Ample evidence supports the appellate court's finding of uncertainty. *Robertson*, 833 F.2d at 816-818. Accordingly, the court of appeals properly required additional information about the project's impacts or, if the Forest Service could not obtain this information, an analysis of significant but uncertain impacts. For the reasons explained in our *Marsh* brief, the court also properly required that any analysis of such impacts meet the standards of the original worst case regulation. Amicus Brief at 21-24.

## CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be affirmed.

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# AMICUS CURIAE

# BRIEF

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No. 87-1703

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1988

F. DALE ROBERTSON, CHIEF OF THE FOREST SERVICE, et al.,
*Petitioners,*

VS.

METHOW VALLEY CITIZENS COUNCIL, et al.,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## AMICUS BRIEF OF THE AMERICAN PLANNING ASSOCIATION

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## STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The American Planning Association (APA) is the national organization of professional planners and planning officials. Many citizens interested in planning issues are also members. APA not only functions as a professional organization for its 22,000 members in 45 chapters, but also publishes books and periodicals on planning and offers training and continuing education programs around the country. Virtually every member of APA is familiar with the National Environmental Policy Act (NEPA). Many members serve either as authors of environmental impact statements (EIS's) or responsible officials whose decisions must balance environmental impacts with other policy considerations.

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[1]All parties have consented in writing to the participation of this amicus pursuant to Rule 36, Revised Rules of the Supreme Court. This brief is filed in support of the position of Respondent, Methow Valley Citizens Council, et al., in No. 87-1703 and addresses the duties of the United States Forest Service under the National Environmental Policy Act and the Council on Environmental Quality regulations implementing NEPA.

This brief is not intended as an authoritative legal memorandum. As a consequence, rigorous citation to legal authority has been left to the petitioner, respondent, and other interested parties. The focus of this brief is conceptual - identifying the essential elements of a mitigation plan and describing the role of mitigation in agency decisionmaking. This brief suggests a framework within which the issues presented by this case can be analyzed. One of APA's principal purposes is to encourage actions that improve public agency decisionmaking processes. Towards this end, this Amicus Brief is offered for the Court's consideration.

## SUMMARY OF ARGUMENT

NEPA is a decisionmaking statute. NEPA's goal is to improve the quality of agency decisions, not the quality of agency documents. The EIS is a tool in this process used to disclose information. One of the central purposes of an EIS is to define the unavoidable adverse impacts associated with an action and its alternatives.

Mitigation measures are an indispensable element of environmental analysis. They are used to avoid, minimize, rectify,



reduce or compensate for environmental impacts. It is essential that the mitigation measures identified be directly applicable to the decision in question. Without knowing mitigation, unavoidable adverse effects cannot be identified and a central purpose of an EIS is not served.

An adequate mitigation plan must contain five elements:

1. Determination of mitigation goals;
2. Evaluation of effectiveness;
3. Identification of new impacts;
4. Analysis of feasibility;
5. Development of implementation/ monitoring programs.

While level of detail may change as an action progresses from the programmatic to site specific stage of a tiered decisionmaking process, information on each of these five elements is always required.

In some special cases analysis may be deferred to a later stage in the decisionmaking process. However, to ensure that mitigation options are not foreclosed, the ability to change the decision must be expressly reserved. Further, deferral is permissible only when a subsequent EIS will be required to disclose the information for public comment.

The *Early Winters* decision fails the tests of adequacy. Mitigation measures identified in the EIS are simply listed. No information is provided regarding the five essential elements of a mitigation plan. Further, the mitigation offered fails to match the decision. No measures are offered that affect the decision in question - the location, size, intensity or duration of a four season destination recreation resort.

Finally, though much of the pertinent analysis has been deferred by the Forest Service, no provision has been made to modify its decision based on this information. Further, no subsequent EIS will be available to disclose this information if and when it becomes available.

A review of the literature on similar decisions, i.e., Mineral King, demonstrates that the Forest Service could have provided far more information on mitigation if it had wished to do so. For example, its own studies identify mitigation measures to reduce the impact on mule deer and provide information on the effectiveness of these measures. Under these circumstances, the EIS fails to satisfy the requirements of



NEPA. Therefore, the judgment of the Court of Appeals should be affirmed.

**ARGUMENT**

NEPA is essentially a decisionmaking statute. *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558, 98 S.Ct. 1197, 1219 (1978). NEPA's procedures serve two functions (1) to ensure that federal agencies have adequate information about the potential environmental consequences of their actions and about legitimate alternatives to the proposed action; and (2) to alert the public to any possible negative environmental effects of the proposed agency action. *Trout Unlimited v. Morton*, 509 F.2d 1276, 1282 (9th Cir., 1974). NEPA procedures are designed to ensure that environmental information is available to public officials and citizens before decisions are made and to ensure that those decisions are based on an understanding of environmental consequences. *40 CFR 1500.1(b), (c)*.

The EIS is a tool used in this process for improving both the information that is available and the process that is used in decisionmaking. A central purpose of an EIS is to define the unavoidable adverse

impacts, that is those impacts which cannot or will not be mitigated. Of necessity, a decisionmaker must weigh these unavoidable impacts in his determination of whether the impacts are acceptable, balancing environmental concerns with economic, technical and other policy considerations. See *42 USC 4321 et seq. (cited as NEPA) 102(2)(B) and 102(2)(C)(ii); and 40 CFR 1501.2(b) and 40 CFR 1508.20.*

Before unavoidable impacts can be defined, the possible and appropriate measures for mitigating or reducing the identified environmental impacts must be established and their effectiveness must be known. Mitigation measures include means for avoiding, minimizing, rectifying, reducing, or providing compensation for environmental impacts. These mitigation measures must be commensurate in detail and appropriate in effect to address the decision and its impacts.

This brief addresses what constitutes an adequate mitigation plan in an EIS. It will place mitigation in the context of decisionmaking theory and show its essential and inextricable role in the process of rational decisionmaking.



## A. NEPA Requires Rational Decision-making.

The NEPA regulations, *40 CFR 1500-1508* provide:

> The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.

*40 CFR 1500.1(c).* This regulation essentially summarizes the rational decisionmaking process. Rational decisions are made by determining the consequences of alternative courses of action available to the decisionmaker and evaluating the comparative merits of the alternatives based on the goals of the decisionmaker and other participants. *(J. Friedman & B. Hudson, 1974; Janis and Mann, 1977; Van de Ver and Koenig, 1976).* As suggested by the regulation cited above, in the context of environmental impact assessment, rational decisionmaking usually involves evaluating the relative merits of alternative plans or projects in light of their environmental, social and economic impacts and pertinent goals.

Complete information about the consequences of decisionmaking is not

always available. The level of detail, specificity and reliability can also vary. Usually one develops more detailed information and the types of information available to the decisionmaker changes as one proceeds from general plan, program or policy decisions to specific project decisions. Rational decisionmaking requires, however, that information be roughly commensurate with the decision being made. That is, a very specific commitment usually requires specific information and broad, general decisions should be made with access to broad and general information about the consequences of the decision. A mismatch between the level of decision and its supporting information can result in a failure of the rational decision process. In interpreting NEPA, this Court has generally agreed with this principle, holding that the detail required by NEPA in an EIS depends on the nature and scope of the proposed action. *See, Aberdeen & Rockfish R.R. Company v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289, 322, 95 S.Ct. 2336, 2356 (1975).*

The importance of having information commensurate with the decision being made



is evident in a comparison of a few of the kinds of information necessary to making a plan or policy level decision (such as a plan for an entire wilderness area) with that necessary for a project level decision (such as development of a portion of that area as a ski resort using septic systems and wells). See Table 1.

The plan level decision is analogous to the forest; the project to the trees. At the first, most basic level of decision-making we need to know where the forest is. This cannot be known by studying individual trees. Only an overview perspective will bring the forest into view. At the project level it is the trees - their kind, location and condition - which are important.

### B. Mitigation is Integral to NEPA Analysis

Information about environmental impact mitigation is an integral part of an EIS and decisionmaking process. This is because choices made concerning environmental mitigation will affect both the impacts and the cost of the option. Mitigation determines which impacts are unavoidable. In turn, this information helps determine whether the project is

TABLE 1: MATCHING INFORMATION WITH DECISIONS

| Information Category | Plan | Project |
|---|---|---|
| topography | 10' contours | 2' contours |
| soils | generalized soils associations and characteristics | specific soil types; bearing capacity; erodability; percolation rate |
| groundwater | generalized yields; seasonal variations; long term trends | ability of well to produce required yield; impact of withdrawal on site, location and production of wells in the vicinity |
| traffic | general volumes and road capacity | specific volumes by use; direction of travel; distribution; peak hour trips; requirements for improvements (e.g., lane addition, signalization; turn lanes) |





acceptable. Therefore, a rational assessment of the economic costs and environmental impacts of an action necessarily involves the consideration of the possible mitigation measures that will be used.

Mitigation information also is integral to decisionmaking because decisions foreclose mitigation options. A decisionmaker should know what mitigation options are available and how they would be affected by any decision. Not having this information may result in unintentionally foreclosing mitigation options. Using the foreclosed options becomes impossible or requires the reversal of earlier decisions.

Decisionmaking involves the simultaneous choice between alternatives and mitigation strategies. The decisionmaker must compare the economic costs and benefits and unavoidable environmental impacts of each alternative. The cost and impact associated with each option depends on the mitigation measures that are selected to accompany the option. For example, how one chooses to insulate a home affects both the cost of its construction and its impact on the use of energy. Therefore, the evaluation and selection of an option must

be done in conjunction with the evaluation and selection of mitigation measures.

To do this it is necessary for the decisionmaker to have more than simply a list of available options. Simply knowing what type of insulation will be used in a house is useless information without knowing what it is there to do, how much heat loss it will allow, what it will cost, whether it is feasible to install, and who will install it. *(Alexander, 1985; Van Meter and Van Horn, 1975).* Not surprisingly, court decisions reflect this viewpoint. A mere listing of mitigation measures does not qualify as a reasoned discussion. *Northwest Indian Cemetery Protective v. Peterson, 795 F.2d 688, 697 (9th Cir. 1986).*

Again, turning to NEPA, an EIS is required to disclose environmental impacts and unavoidable adverse effects of a proposed action. *NEPA 102(2)(c)(i), (ii).* To determine unavoidable effects, mitigation measures must be established. The unavoidable impacts of a proposed action are those environmental impacts that remain after considering the mitigation. A conceptual equation which illustrate these points can be described as follows:



| | | | | |
|---|---|---|---|---|
| **Environmental Impact** | **-** | **Mitigation Measures** | **=** | **Unavoidable Adverse Effects** |

A decisionmaker must also consider the economic costs of a decision. Mitigation measures are not free and contribute to the total cost of any option being considered. This is illustrated as follows:

| | | | | |
|---|---|---|---|---|
| **Project Cost** | **+** | **Cost of Mitigation & Unavoidable Adverse Impacts** | **=** | **Total Cost** |

Thus, when viewed in this framework, mitigation is not something that can be added at the end - like icing on a cake. Rather, it must be integrated with decisionmaking. The identification of mitigation measures is an indispensable element of rationale decisionmaking.

In order to know how mitigation will affect these considerations, certain basic categories of information about mitigation options are necessary. Without such information, the decision to choose a certain option is made without full knowledge of the environmental impacts or

economic costs of the decision. If the true cost and effect of mitigation had been known, a totally different alternative may have been chosen.

### C. To be Adequate, Mitigation Must Include Five Elements

There are five categories of information about mitigation that should be presented in an EIS.

1. Mitigation Goals Must Be Determined. The impact or impacts intended to be reduced and the acceptable impact level or threshold must be known. This information guides the decisionmaker's decision regarding the relevance of the mitigation measures to the options under consideration and the extent to which impacts must be affected by mitigation.

2. Effectiveness of a Mitigation Measure Must be Evaluated. Effectiveness can be expressed in terms of both the extent to which the impact will be reduced as well as the probability of success of the mitigation measure. Information on the track record of the measure, applied in other comparable situations, can be used to reduce risk and uncertainty, a goal of rational decisionmaking.



3. Any New Adverse Environmental Impact Created By Mitigation Must Be Identified. The environmental impact of mitigation measures adds to the unavoidable impacts and costs associated with a decision option. For example, improvement to or protection of mule deer habitat may involve the purchase of land or restrictions on the use of private land - costs and/or burdens that must be disclosed before a decision is made.

4. Mitigation Analysis is Not Complete Unless A Measure's Feasibility Is Established. Feasibility, which refers to the capability of seeing an action through to completion, must be known and discussed in terms of legal, social, economic, and technological factors. A mitigation measure might be socially acceptable and technologically possible, but unrealistic economically.

5. An Implementation/Monitoring Plan Must Be Developed For Each Mitigation Measure. The requirements for implementation of a mitigation must be known. Without this information the decisionmaker cannot determine whether decisions about effectiveness are valid. Components of implementation include the

identification of responsible persons or agencies, funding, and monitoring. Related to both effectiveness and implementation, there should be a contingency plan should monitoring demonstrate that the selected mitigation is ineffective.

All five categories of information - goals, effectiveness, impacts, feasibility, and implementation - are essential for mitigation to fulfill its role in the decisionmaking process regardless of the decision level.[2] The level of generality or specificity inherent in the decision under consideration does not affect the need for all five categories of information, it only affects the level of specificity with which they are treated. If any of these categories of information is missing, the mitigation information will not allow the decisionmaker to identify the unavoidable adverse environmental impacts that could occur.

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[2]These five categories are described in various articles published by USFS in the *Proceedings of the Mitigation Symposium: A National Workshop on Mitigating Losses of Fish ~~and~~ Wildlife Habitants, July, 1979.*



### D. Special Treatment Of Mitigation Is Needed For Tiered Decisions

NEPA and its implementing regulations recognize that many decisions will be made in tiers or stages, proceeding from a very general decision such as a decision to undertake a certain kind of action (often referred to as a programmatic decision) to subsequent more specific decisions based on that initial decision. Progressively, decisions must be made on location, size, intensity, duration and specific site design. *40 CFR 1502.20, 1502.28. See also 40 CFR 1501.2(b). (Etzioni, 1986; Steiner, 1979)* In the case of multi-stage or tiered projects, it is not whether the project's site specific impact is evaluated, but when such evaluation should occur. *County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1378 (2d Cir. 1977) cert. denied, 434 U.S. 1064, 98 S.Ct. 1238 (1978)* [3].

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3 Deferral of discussion on some issues from an earlier EIS until a later EIS has been permitted. To do so, however, the Court looked at the realistic possibility of acquiring the information and the necessity of the information at a particular stage in a project. Further, this is allowable only if a multi-stage project can be modified when the new information is available; the agency has reserved the power

In addition to guiding subsequent decisions, early choices foreclose subsequent options. These foregone options could include important ways of reducing the economic cost or environmental impact of the project or plan. A rational decision requires knowledge of the choices foregone by decisions. This includes mitigation options that may become infeasible as a result of a given decision.

Although tiered decisions begin with broad, general choices, they nevertheless are made with the best available information. At the earlier general stages this analysis occurs at a more general level, it is still based on the evaluation of the relative merits of different options.

What varies from stage to stage is not the need for this information, but the level of detail of the information that is available. *(Delberg, 1974)*. At the earliest stage of decisionmaking the decisionmaker will only have general options before him. Even though general in

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to make such modification based on new information; and a subsequent EIS will be available to disclose the new information. *County of Suffolk*, 562 F.2d at 1378.



nature, a mitigation plan is not adequate unless it tells both the decisionmaker and public something about goals, effectiveness, impacts, feasibility and implementation.

The answers to these questions will frequently determine whether a project is a "go" or "no go." If for example it is impossible or prohibitively expensive to mitigate impacts which by law must be avoided, or which are simply unacceptable, it may not be worth proceeding to subsequent stages in the decision process. This can only be known by early identification of available mitigation options.

Each subsequent decision in a tiered process will consider a more detailed set of choices, a more detailed set of impacts, and result in a more detailed decision and commitment which will guide the formulation of choices in the decisions which follow. Alternatives become narrower in scope and the decision becomes increasingly irrevocable. A more detailed understanding of mitigation measures is needed in order to understand the unavoidable adverse impacts that remain. At each stage of this process, the detail in the choices

considered, the impacts being evaluated, the mitigation measures, and the commitments made should be commensurate with one another. *(Gregory and McDaniels, 1987)*.

A detailed decision regarding a specific site plan cannot be rationally based upon very general impact studies. Similarly, early general decisions do not require highly specific impact information.

However, if detailed decisions are being made, then detailed mitigation information should be available. Doing otherwise increases the risk that mitigation measures will be found to be infeasible or ineffective after making commitments based on the assumption that they would work.[4] In such cases, because significant expenditures may have been made, decisionmakers feel they cannot deny a project even though its unavoidable impacts are unacceptable. It is this result which NEPA is designed to avoid. *40 CFR 1500.1(b)*.

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[4]One commentator has likened mitigation to Noah's Ark - it being the first recorded example of a mitigation measure used to avoid a portion of the impact of the great flood. See *Yarn*.



### E. *Early Winters* Mitigation Failed To Match The Decision in Question

Petitioner suggests that a "tiered" decisionmaking process has been used for Early Winters *(Pet. Br. p. 26)*. Petitioner agrees that the level of detail devoted to mitigation measures depends on the nature of the action proposed *(Pet. Br. p. 28)*. Therefore, to determine the extent and depth of analysis of mitigation that is required depends on where the decision in question rests in the tiered or multi-staged process.

The *Record of Decision and Special Use Authorizations* (SUP) reflect a specific decision regarding the location (*Sandy Butte*); the size (3900 acres); the intensity (8200 skiers at one time); and the duration (30 years) of a destination, four season, recreation resort. More specifically, planning, construction, operation and maintenance are authorized with construction required to begin within two years of the issuance of the permits. Further, the permits set forth terms and conditions of operation including the requirement that no construction is authorized until, among other requirements, a specific site development plan is

approved. This plan must show all buildings, service areas, roads and structures. In the context of the staged or tiered decisionmaking process, one agency decision remains - site plan approval. Therefore, the mitigation measures relevant to the decisionmaker are not those relating to site layout and design, for those can be reserved for later decision if a subsequent EIS is expected. At this time, the decisionmaker must be fully informed of those measures that affect the environmental impacts associated with the *Sandy Butte* location, the size and intensity of the operation (3900 acres/8200 skiers) and the project's duration (30 years). Mitigation measures must address these decisions - they do not.

As explained previously, in a tiered or staged decision process, the preceding decision serves to guide and limit subsequent decisions. Therefore, information on environmental impacts and mitigation measures from preceding stages serves the same function. In the case of *Early Winters*, three decision documents were prepared in earlier stages of the tiered process.



In 1968, the *Winthrop Ranger District Multiple Use Plan* (MUP) was completed. In 1970, this plan was revised to indicate that winter sports activities may be included in the *Early Winters* area depending on feasibility studies that were to be initiated in the near future. Also in 1970, a second plan was prepared by the Forest Service focusing specifically on winter sports in the North Cascades.

The *1970 Winter Sports Study* established three priorities for winter recreation development. First priority, for the next ten years (1970-1980), was to develop fully existing ski areas. Second priority was to study intensively possibilities for ski-touring, snow shoeing and ski mountaineering. Two specific sites were proposed as alpine tour sites.

The third priority established in the *1970 Winter Sports Study* was for new downhill ski areas. Three sites were identified, two were classified as locally important and one site, *Sandy Butte*, was considered to have the necessary physical features for a site of major importance. The *1970 Study* concluded that:

> Time schedules for development of these three sites will depend upon demand, need, discovery of better potentials, the success of Priority

> One recommendations and the results of a... systematic procedure for developing potential winter sports sites.[1] *Winter Sports Study*, p. 8.

In total, thirteen potential downhill sites were analyzed. Though only operational factors were considered, it is clear from the *Study* that programmatic (destination ski resort) and location (*Sandy Butte*) decisions were made in 1970.

These two studies were followed in 1974 by the *Joint Plan for the North Cascades Area*. This *Plan*, prepared by the National Park and National Forest Services, also identified the *Early Winters* area as a potential downhill ski resort site. While all three of these documents were prepared or revised after the effective date of NEPA (January 1, 1970), not one of them was subjected to any environmental analysis. Not one met the standards of NEPA. Therefore, no subsequent stage or tier in the decisionmaking process could rely on any prior environmental analysis, for such analysis is non-existent.

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[1]The procedure is set forth in the *1970 Study* at page 8-10 and reflects a near classic listing of the steps taken in a multi-staged, rational decisionmaking process.



The next planning document, the *Early Winters Sports Study*, was completed a decade later, in 1984. A draft and final EIS was prepared, the adequacy of which is challenged in this proceeding. For the first time, the environmental impacts, unavoidable adverse effects, alternatives and mitigation measures associated with a destination recreation resort and the *Sandy Butte* location, are disclosed. While "tiered" decisionmaking may have predated the *Early Winters SUP* decision, tiered environmental analysis did not.

The failure to comply with NEPA at early stages in the decisionmaking process increases the scope of analysis and level of detail that must be expected before the issuance of a special use permit. For example, while previous studies established that a new destination downhill ski resort was needed and that the *Sandy Butte* site was the best location for such a facility, no environmental analysis has been completed comparing the impact of a downhill ski resort with other resource uses. Further, the environmental impacts of *Sandy Butte* have not been compared with those that could be expected at other

locations.[6] A fully informed decision could not be made without this information. Further, subsequent decisions in the tiered process would be deficient unless this information is generated. The only way to remedy this situation is to ensure that the environmental documents prepared for the SUP cover programmatic and location decisions as well as those relating to size, intensity and duration. Further, while deferred analysis may be appropriate in some circumstances (see Footnote 3), it must be expressly reserved for a subsequent EIS. Here it was not. Rather, construction is required to begin in two years and permit conditions focus on operational issues. The mitigation measures presented in the *Early Winters* project do not match the scope and detail of the decision.

### F. The *Early Winters* Mitigation Failed To Meet The Five Element Test

In a tiered decisionmaking process, the failure to complete sufficient analysis at

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[6]Both of these areas of analysis are included in the systematic procedure described in the *1970 Study*. The Ninth Circuit has required analysis of alternative locations and Petitioners have not presented this issue to the Court.



earlier stages compounds the difficulty of decisions at later stages. This situation can be illustrated by examining the environmental impacts of the *Early Winters* project on mule deer.

The *1984 Study* discloses an unavoidable adverse impact on the mule deer population amounting to a reduction in population of up to 15 percent, while acknowledging, however, that other agencies with expertise (i.e. the Washington State Departments of Ecology and Game) place this estimate at 50 percent. A list of possible mitigation measures is also identified,[7] most of which are site specific to be incorporated in project layout and design. This focus on site planning is entirely understandable since it is the next decision in the tiered process. However, to focus on site design means that significant mitigation measures that would have normally been identified at an earlier programmatic or location phase - perhaps the only ones that can

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[7] The *1984 Study*, pp. 16-17 lists site specific measures concluding that the exact measures used cannot be determined until a Master Plan is reviewed. This listing is in the mitigation section of the Study. Further back in the document at pp. 77-78, off-site measures are identified but never referenced in the summary.

significantly reduce the impact of the decisions - are given only very general treatment.

Concern regarding the environmental impact of ski area development on mule deer population is not unique to *Early Winters*. Previously, the U.S. Forest Service was faced with this issue in the proposed development of the Mineral King Ski Area in the Sierra Nevada Mountains in California.[8]

To better understand the environmental impact and mitigation measures relating to mule deer, the Forest Service commissioned research studies which were completed in 1978.[9] The Study indicates the single most effective mitigation measure is to reduce

[8] *Mineral King* was the subject of litigation in *Sierra Club v. Morton*, 405 US 345, 92 S. Ct. 1361 (1971). After subsequent decisions by the District Court, the project has not built and agency jurisdiction was been transferred from the Forest Service to the National Parks Service. *Mineral King* is instructive however because it is very similar in size and scale to the *Early Winters* proposal and involves similar impacts.

[9] See generally *Cornell, et al.*, pp. 474-480.



the scale of development.[10] Land acquisition, winter range management, and improvement to migratory summer range were some of the other measures identified.[11] All have there own environmental consequences, and differing levels of effectiveness and feasibility. Possibly, the cost and impact of these measures, if considered at an earlier stage in the tiered process, might have led the Regional Forester to have selected another location; or reduced the size of the project; or selected an alternative involving fewer skiers; or shortened the duration of the approval; or some combination of the above. All we know for sure is that the Forest Service did not disclose its own research and that none of these options have been reserved for consideration at later stages of the decision process.[12] The mitigation

[10] *Ibid*, p. 479

[11] *Ibid*, pp. 477-479

[12] The terms and conditions of the SUP provide no authority for the Forest Supervisor or the Regional Forester to require any change due to the environmental impact of the project on mule deer. Arguably, only conditions 48, 50, 51 and 76 even relate to possible environmental

measures presented in the *Early Winters* project do not meet the five element test proposed by this Amicus.

## CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully Submitted

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impacts. The Record of Decision does identify three off-site mitigation measures intended to alter the project's impact on mule deer. However, effectiveness, impact, feasibility and implementation are not addressed. Further, none are linked in any way to the approval of the project.